
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 15904 ✓

CROWN ZELLERBACH CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The order of the Commission must be set aside because the essential findings of fact of the Commission are not supported by substantial evidence on the whole record. As this Court stated in *Carter Products Inc. v. FTC* (9th Cir., June 16, 1959, No. 15,373):

“The [Federal Trade Commission] Act prescribes that the findings of the Commission as to the facts, if supported by evidence, shall be conclusive on a reviewing court. 15 U.S.C.A. §45(c). The Administrative Procedure Act added the further requirement that to be valid, the findings of federal administrative agencies must be supported by *substantial* evidence in the record considered as a whole.” (Emphasis in original)*

* Section 11 of the Clayton Act, as amended (64 Stat. 1126, 15 U. S. C. § 21; amended 72 Stat. 943), and Sections 7(c) and 10(e) of the Administrative Procedure Act (60 Stat. 241, 243, 5 U. S. C. §§ 1006(c), 1009(e)) similarly require that findings of the Commission in a proceeding under Section 7 of the Clayton Act be supported by substantial evidence on the whole record.

The Commission, however, does not even attempt to refer to substantial evidence on the whole record to support its crucial finding that "Census coarse paper" is the relevant "line of commerce", without which finding its decision cannot stand. The Commission makes no effort to satisfy the requirements of Section 11 of the Clayton Act, as amended, and Sections 7(c) and 10(e) of the Administrative Procedure Act.

Instead, the Commission espouses a topsy-turvy theory of law that only *after* the competitive consequences of an acquisition have been examined need the relevant line of commerce be "specified" and that it need never be proved (Comm. Br. 91, 236-237). This novel theory, which is inconsistent with the Commission's own decision in this case and with the other decisions under the amended Section 7 of the Clayton Act, was evidently conceived as a last-gasp substitute for the requirement that the Commission's order be supported by the reliable, probative and substantial evidence in the record considered as a whole (Administrative Procedure Act §§7(c) and 10(e)). On no other basis could one explain the Commission's failure to give a single citation to the evidence in the record to support its crucial finding that the "Census coarse papers"—wrapping, bag, shipping sack, waxing, gumming, envelope and other converting papers—constitute a discrete product market, *i.e.*, a "line of commerce" within the meaning of Section 7.

Nor does the Commission refer to substantial evidence on the whole record to support its findings:

(i) that the 11 western states are a geographic market, *i.e.*, a "section of the country" within the meaning of Section 7; and

(ii) that the effect of Crown's acquisition of St. Helens may be substantially to lessen competition or to tend to create a monopoly in the sale of "Census coarse papers" in the West.

A further, and independent, compelling reason why the Commission's order must be reversed is the Commission's inability to answer our demonstration that Crown was deprived of its Constitutional right to a fair hearing according to due process of law.

The Commission's market findings are not supported by substantial evidence

We demonstrate in Point I below that the Commission concedes that there is no substantial evidence to support its finding that "Census coarse paper" is the relevant product area of effective competition (*i.e.*, "line of commerce").

Instead of attempting to support its finding that "Census coarse paper" is the relevant product market for this case, the Commission devotes itself to an unsuccessful attack on the trade coarse paper line of commerce which Crown proposes and which the evidence shows is the relevant line of commerce. In so doing, the Commission expressly contradicts each and every reason it gave in its opinion to support its own "Census coarse paper" line of commerce.

In Point II we show that the Commission has also failed to support its finding that the "11 western states" are the relevant geographic area of effective competition (*i.e.*, "section of the country").

The Commission relies on irrelevant and incorrect statistics and on bits and pieces of evidence, practically all of which relate only to purchases of wrapping paper (one of the many papers classified by the Census as "Census coarse paper") by paper jobbers (one of the many types of purchasers of papers classified as "Census coarse paper") in the Pacific Coast states (three of the 11 western states).

The Commission ignores the pattern of Crown's and St. Helens' sales of Census coarse paper grades, the substan-

tial shipments of Census coarse paper grades into the West, and all the other evidence proving that the West is not an isolated market.

**In order to excuse its failure to prove the
relevant market, the Commission proposes
a fallacious theory of law**

Put for the first time in its history to the test of supporting its line of commerce and section of the country findings by reference to substantial evidence, and recognizing its inability to do so, the Commission proposes an upside-down approach to Section 7 which would read the requirement for market definition out of the statute.

The Commission poses the Section 7 questions in the following reversed order:

“Did the Commission properly conclude that the merger had the proscribed statutory effect?

“Is the Commission’s determination of the relevant market, geographically and product wise, supported by substantial evidence?” (Comm. Br. 17)

and entitles Point I of its brief:

“The effect of the acquisition ‘may be substantially to lessen competition or to tend to create a monopoly.’ ” (Comm. Br. 28)

The Commission’s asserted justification for examining competitive consequences (without reference to any market) *before* determining the relevant market is, as it states throughout its brief, that

“Only after the probable competitive consequences of a merger have been identified and examined is it appropriate to select [Note: not *prove*] the particu-

lar market or markets with respect to which the competitive consequences shall be formally tested.” (Comm. Br. 33, 91, 93, 129-130, 140, 167, 236-237)

There is not a single citation anywhere in the Commission’s brief to support this distorted legal theory that the relevant line of commerce should be “selected” after the case has been decided.* The command of Section 7, as well as the cases under Section 7, are explicitly to the contrary.

Section 7 makes unlawful an acquisition

“ . . . where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”

Thus, it is essential to determine the relevant market (the line of commerce and the section of the country) *before* analyzing the evidence on the question whether there may be a substantial lessening of competition or tendency to monopoly *in that market*.

“ . . . the ban on a substantial lessening of competition ‘in any line of commerce in any section of the country,’ requires, for determination of a violation, *first*, a definition of a relevant market in which a lessening of competition has probably occurred

* The Commission claims in this Court that it took the same approach below, to wit, that in determining the relevant line of commerce and the relevant section of the country, it took into consideration the product and geographic areas where the alleged “illegal impact” of the merger supposedly occurred (Comm. Br. 93, 129-130, 167). That is not so. There is not a word in the sections of the Commission’s opinion dealing with the line of commerce and the section of the country respecting the alleged “illegal impact” of the merger (R 608-613). That discussion is where it belongs—in the section of the Commission’s opinion which discusses the alleged effects on *competition in its market*, which section *follows* its discussion of market definition (R 613-619).

and, *second*, analysis of the nature and extent of the competition *within that market*.” (*American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F. 2d 524, 527 (2d Cir. 1958); italics added)

Likewise, the Supreme Court stated in the *General Motors* case, *United States v. E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 593 (1957):

“*Determination [*] of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition ‘within the area of effective competition.’ Substantiality can be determined only in terms of the market affected.*” (Italics added)**

The Commission’s finding of an adverse effect on competition is not supported by substantial evidence

The Commission’s argument on the competitive consequences of the acquisition is discussed in Point III below.

We demonstrate there (i) that the Commission mistakenly equates western *production* of the papers classified by the Census as Census coarse papers, with western *supply* of those papers, and disregards *sales* within the West, and (ii) that the Commission addresses its argument to only a small part of its relevant “market”, whereas (iii) all the evidence proves that there is no reasonable probability that Crown’s acquisition of St. Helens will result in substan-

* *General Motors* requires that the relevant market be *proved* and not merely “selected” (see also Pet. Br. 36, 120-121, 170-172).

** To the same effect: *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 583 (S. D. N. Y. 1958) (see also Pet. Br. 35, 120-121, 170-172).

tially lessening competition in, or in a monopoly of, even the narrow and unsupportable “market” found by the Commission.

Crown was not accorded a fair hearing

The Commission admits that its incompetent and biased survey report, and the equally incompetent and biased testimony of its economist based thereon, were improperly received in evidence. It asserts merely that this was not prejudicial to Crown. Our *proof* that it was prejudicial, against the Commission’s unsupported *assertion* that it was not, is discussed in Point IV.

We also demonstrate in Point IV that the Commission (i) concedes that it refused to define what it claimed to be the relevant line of commerce until after the record was closed and (ii) admits that it failed to amend or to dismiss its complaint after the allegations of the complaint were disproved; instead, it rested its decision upon a supposed violation wholly different from that alleged in the complaint.

Essential findings and conclusions of the Commission are indefinite and uncertain

In Point V we discuss the Commission’s unsuccessful attack on our showing that three of the findings and conclusions upon which its order is based are indefinite and uncertain and, therefore, do not comply with the requirements of Section 11 of the Clayton Act, as amended, and Section 8(b) of the Administrative Procedure Act.

The Commission has failed to respond to our specification of the errors committed below

The Commission's failure to respond to the detailed specification of its errors set forth in the appendix to our main brief is discussed in Point VI.

The Commission's order is not authorized by Section 11 of the Clayton Act

In Point VII we discuss the fact that the Commission exceeded its powers under Section 11 of the Clayton Act, as amended, in framing its order of divestiture.

POINT I

The Commission concedes that its finding that "Census coarse paper" is the relevant line of commerce is not supported by substantial evidence and thereby confesses reversible error.

The first issue in this case is whether the Commission's narrow and unrealistic "Census coarse paper" line of commerce is supported by substantial evidence on the whole record, as required by Section 11 of the Clayton Act, as amended, and Sections 7(e) and 10(e) of the Administrative Procedure Act.* We demonstrate below that the Com-

* See p. 1n, *supra*. Section 7(c) of the Administrative Procedure Act provides:

" . . . the proponent of a rule or order shall have the burden of proof . . . no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence."

mission's line of commerce finding is not supported by substantial evidence on the whole record.

We also demonstrate that the line of commerce established by the evidence consists of the grades of paper which are referred to in the trade as "coarse paper" and which the Hearing Examiner and the Commission in their opinions referred to as "trade coarse paper" (R 572, 609).*

The Commission prefers not to argue the issue whether its "Census coarse paper" line of commerce finding is supported by substantial evidence on the whole record; instead, it confines itself to a diversionary attack on the trade coarse paper line of commerce (Comm. Br. 89-140).

A. The Commission affirmatively destroys its "Census coarse paper" line of commerce finding.

1. The Hearing Examiner's argument in support of his "Census coarse paper" line of commerce finding was admittedly indefensible.

In their proposed findings, Commission counsel urged the Hearing Examiner to find several different lines of commerce (R 336-337), none of which, however, was the "Census coarse paper" line of commerce which the Hearing Examiner did find and which was later adopted by the Commission. The Hearing Examiner concluded:

"The line of commerce involved in this proceeding is the various papers falling within the Census

* Trade coarse paper includes all the grades of paper listed in the following nine categories of the Bureau of the Census classification system for reporting production statistics: Census coarse paper, Census special industrial paper, Census sanitary tissue stock, Census tissue paper except sanitary and thin, Census container board, Census bending board, Census nonbending board, and Census special paperboard stock. Trade coarse paper also includes the converted paper products made from the papers reported in these nine Census categories. (Pet. Br. 158-160)

category of coarse papers. About 84 per cent of the production of St. Helens was Census coarse papers. [Crown] produced 51.5 per cent of the total of Census coarse papers produced in the eleven Western States. *Consequently* Census coarse papers is the line of commerce principally affected by the acquisition. . . . *Since* the greater proportion of the production of both [Crown] and St. Helens was in the category of Census coarse papers, the area of effective competition as to products would be within that category.” (R 589-590; italics added)

The Hearing Examiner could find nothing to say in support of his “Census coarse paper” line of commerce finding except the *non sequitur* quoted above (Pet. Br. 176-177).*

2. The Commission adopted the Hearing Examiner’s “Census coarse paper” line of commerce, but rejected the Hearing Examiner’s “reasoning” as incorrect and stated its own “rationale”.

In response to Crown’s argument that a line of commerce must be proved and not merely asserted and that the Hearing Examiner’s “reasoning” was completely inadequate to support his finding, the Commission took a different tack. It stated:

“ . . . a question for determination is whether or not the coarse paper line, including wrapping, bag and sack papers and converting papers, which the hearing examiner refers to as Census coarse papers, is a ‘line of commerce’ within the meaning of the Clayton Act.

“All such papers are in a relatively allied line, particularly in respect to markets and end uses. . . .

* The statement is not even factually correct; Census coarse paper grades were *not* “the greater proportion of [Crown’s] production” (RX 62, p. 19).

Such factors as physical characteristics, markets, prices, and uses, all or in part tend to distinguish these papers from other papers and paperboard.

* * * * *

“It is our opinion, in view of the foregoing considerations, that the coarse paper line relating generally to coarse wrapping papers, bag and sack papers and convertible papers is a sufficiently distinct product line to be a ‘line of commerce’ within the meaning of Section 7. To the extent that the hearing examiner relied on factors other than those mentioned in this opinion in determining the relevant line of commerce, the initial decision does not represent the view of the Commission.” (R 610-612)

However, in briefing this question to this Court, the Commission finds that its own rationale is as indefensible as the Hearing Examiner’s.

3. The Commission now concedes that its own rationale is also indefensible.

Early in its brief, the Commission recites that St. Helens’ production fell largely in the Bureau of the Census category of coarse papers and that those papers, *i.e.*, Census coarse papers, accounted for 84% of St. Helens’ production (Comm. Br. 35). *Immediately following* this recital, the Commission states:

“*Having identified the significant product area . . . the next question for determination is the significant geographical area*” (Comm. Br. 36; italics added)

This is the *identical* “reason” given by the Hearing Examiner and rejected by the Commission (R 589-590, 612; Pet. Br. 176-177). Yet, nowhere in its brief does the Commission give any other reason or refer to any evidence to support its Census coarse paper line of commerce finding.

Thus, although the Commission properly states the question before this Court:

"Is the Commission's determination of the relevant market, . . . product wise, supported by substantial evidence?" (Comm. Br. 17)

it never attempts to answer that question. In fact, the admissions made by the Commission during the course of its line of commerce argument (Comm. Br. 89-140) constitute a clear concession that its unrealistic Census coarse paper line of commerce *cannot* be supported by substantial evidence.

4. The Commission destroys its "Census coarse paper" line of commerce finding.

The evidentiary issue is presented by the Commission thus:

" . . . the question is this: Are the product line papers [the Census coarse paper grades] distinguished from other papers by such factors as peculiar characteristics and uses, markets and price behavior?" (Comm. Br. 92)

The Commission then argues that trade coarse papers, other than those classified by the Census in its "coarse paper" statistical classification, are different in end uses, physical characteristics, prices and markets from the "Census coarse paper" grades, and that therefore they cannot be part of the same line of commerce. The Commission's theory is that the physical characteristics of papers are determined by the end uses to which they are applied and that papers which serve different, and largely noncompeting, end uses are not in the same product market (Comm. Br. 94-95).

However, the Commission is forced to concede that there is just as much difference in end uses, physical characteristics and prices *among* the papers classified as Census coarse paper as there is *between* (i) the Census coarse paper grades and (ii) the other trade coarse papers. The conclusion that the Commission necessarily draws from its own argument is that its own Census coarse paper line of commerce and Crown's asserted trade coarse paper line of commerce are *both* invalid.

Thus, the Commission argues that there are such differences *among* wrapping paper, bag paper, shipping sack paper, envelope paper, waxing paper and gumming paper (all Census coarse paper grades) that these various Census coarse paper grades are sold in several *different* markets, and represent several *different* lines of commerce.

In other words, the Commission not only concedes but affirmatively asserts that there must be a negative answer to its own question, to wit: Is there substantial evidence on the whole record to support the Commission's finding that the Census coarse paper grades *together* constitute a line of commerce?

It is not surprising, therefore, that the Commission tries to read the necessity for market definition out of Section 7 by proposing an upside-down and fallacious theory of law.

(i) *The Commission's own description of the Census coarse paper grades points up differences among papers classified as Census coarse paper, in terms of physical characteristics, end uses and markets, which, on the Commission's erroneous approach, would put each of the grades and types of Census coarse papers in a separate market:* After pointing out that papers classified as Census coarse paper are used mainly for wrapping and packaging (while conceding in a footnote that its line of commerce includes

only certain papers and not all wrapping and packaging materials; Comm. Br. 94-95), the Commission asserts:

(1) Wrapping papers are used as a wrapping material, but vary among themselves in weight, color, strength, waterproofing, density and "the like" (Comm. Br. 95-96);

(2) Bag papers come in different weights and are used to make many different kinds of bags, and differ importantly from wrapping papers in their "sizing" (Comm. Br. 99);*

(3) Shipping sack paper is converted into shipping sacks and is then sold principally to cement and fertilizer companies; it differs from bag papers in that it is produced to particular technical specifications (Comm. Br. 100-101);

(4) Waxing paper is used by converters of waxed paper products and differs from other Census coarse paper grades in that it is coated with wax or paraffin and is widely used as a bread wrapping (Comm. Br. 102);

(5) Gumming paper is used to make gummed tape and differs from other Census coarse paper grades in that it has special characteristics of strength, waterproofing and density (Comm. Br. 102); and

(6) Envelope paper is sold to envelope manufacturers and, the Commission argues, there are two non-competitive grades of envelope paper, depending upon whether the pulp used in making the paper was pro-

* "Sizing", generally, is that property of paper which relates to its resistance to the penetration of liquids or vapors, particularly water (*The Dictionary of Paper* (1951 ed.), p. 328; this reference work is cited by the Commission several times in its brief (Comm. Br. 35, 99, 100, 102) pursuant to stipulation (R 2820).)

duced by the kraft (sulphate) process or by the sulphite process (Comm. Br. 102-103).*

After asserting what it alleges to be significant differences *among* these Census coarse paper grades,** the Commission proceeds to argue that there are similar differences *between* these Census coarse paper grades, on the one hand, and other trade coarse papers, on the other hand.

(ii) *The differences which exist among the Census coarse paper grades are the same as those which the Commission asserts exist between Census paperboards, Census tissue papers and Census special industrial papers, on the one hand, and the Census coarse paper grades, on the other hand:* The Commission states that the Census paperboards are used primarily to make paper boxes and cartons (Comm. Br. 105-108);† that the Census tissue papers are used for sanitary purposes and as a lightweight wrapping paper (Comm. Br. 115); and that the Census special industrial papers are used to make tabulating cards, tags and file folders (Comm. Br. 117).

* The Commission then argues that sulphite papers, generally, are "not competitive" with sulphate papers whenever strength is the decisive factor (Comm. Br. 102-103); yet, sulphite and sulphate (kraft) papers are both included in the Commission's Census coarse paper line of commerce (RX 62, pp. 38-42).

** The Commission *never* discusses the other Census coarse paper grades such as asphaltting paper, cup stock, creping paper, glassine and greaseproof paper and "other converting" paper (RX 62, pp. 38-42).

† The only record reference given by the Commission for its assertion that "A basic product differentiation in the paper industry is between paper and paperboard" (Comm. Br. 105) is the testimony of its witness, Professor John A. Guthrie (R 2758), whose book, "Economics of Pulp and Paper", was stricken from the record by the Hearing Examiner because, *inter alia*, he "has not qualified under the present state of this record as an expert in this field" (R 2817-2818).

Thus, the Commission asserts, these papers are “positively non-competitive” with the Census coarse paper grades because they serve different end uses; it follows, the Commission argues, that they are in different lines of commerce (Comm. Br. 107-108, 115, 118).

These differences, however, are the same as the differences *among* the Census coarse paper grades: Bag paper is used to make bags; envelope paper is used to make envelopes; wrapping paper is used without further processing as a wrapping material; waxing paper is used to make waxed paper products; gumming paper is used to make gummed tape; etc. Thus, to track the Commission’s language (Comm. Br. 118), the many different Census coarse paper grades “do not compete with each other” and therefore cannot be part of the same line of commerce.

The Commission then points to differences in physical characteristics. It states that the Census paperboards, as a matter of “general observation”, are heavier than most Census coarse paper grades (Comm. Br. 108); that the Census tissue papers are lighter in weight (Comm. Br. 115-116); and that the Census special industrial papers are “specification” papers (Comm. Br. 117-118).

The Commission is again observing differences equally present among the Census coarse paper grades. Shipping sack paper is a “specification” paper (R 3783-3784 [Ticoulat]) and the various papers classified as Census coarse paper range in basis weight from 18# to 250#; this range includes the weights of some of the Census tissue papers (toweling is 32#), and of most of the Census paperboards (the most common weight of paperboard is 126#) (RX 42Z-3; RX 62, pp. 14-16; RX 92A, p. 7; R 2946-2947 [Hunt]).

The Commission then argues that various papers are sold in different “markets” in that paper and paperboard

are not usually purchased by the same customers (Comm. Br. 110-114).

The Commission is again forced to admit, however, that the same shoe fits the Census coarse paper grades. The different papers classified as Census coarse paper are not sold to the same customers: envelope manufacturers buy envelope paper (a Census coarse paper grade) and do not buy such other Census coarse paper grades as shipping sack paper and gumming paper; shipping sack manufacturers buy shipping sack paper (a Census coarse paper grade) and do not buy such other Census coarse paper grades as waxing paper, fly paper, soda straw paper and butcher paper; gummed tape manufacturers buy gumming paper (a Census coarse paper grade) and do not buy such other Census coarse paper grades as asphaltting paper, cup stock and creping paper; etc. (Comm. Br. 95-103; see also Pet. Br. 251, 257 and CX 117).*

The Commission's last argument is that:

"The 'demand and demand prices' for the coarse papers, 'Census' or 'trade,' do not all move together." (Comm. Br. 119)

and concludes that:

"the price movements and profit variations between the various papers, including the product-line papers [the Census coarse paper grades] and the paperboards are further evidence that these products are sold in response to different market demands." (Comm. Br. 123)

In addition to these statements, which by themselves destroy the Commission's attempt to isolate the Census

* Consistently, the Commission adopts the observation made in our main brief that "purchasers of Census coarse papers are in widely separated fields of business" (Comm. Br. 118, 119).

coarse paper grades as a product market, the evidence of price movements shows that the prices of wrapping paper, butcher paper and waxing paper (the only Census coarse paper grades discussed under prices) did not always move together (Comm. Br. 121-122; RX 103, p. 23), and the evidence of profit variations shows that the profit per day on the sale of Census coarse paper grades ranged from \$12,060 for unbleached wrapping paper to \$28,851 for unbleached gumming paper (Comm. Br. 126; RX 92A, p. 430).

(iii) *Conclusion*: Thus, on the Commission's concessions and admissions, on its own product market test, to wit, that

“end-use and the physical characteristics required therefor most reliably delineate the line of commerce or relevant market in which a specified paper is sold.” (Comm. Br. 105)

and on its assertion that papers which are sold to different purchasers at different prices “are not competitive with one another” and “are not part of a single line of commerce” (Comm. Br. 110, 127, 128), it is impossible to conclude that “Census coarse paper” is a rational and defensible line of commerce.

In view of the foregoing, it is not surprising that the Commission nowhere attempts to support its line of commerce finding. In one sub-heading in its brief, the Commission promises to support this finding:

“8. *The Commission's finding as to line of commerce is fully substantiated by the record.*” (Comm. Br. 127)

but the promise is never fulfilled. Under this sub-heading, instead of attempting to support its line of commerce finding by reference to substantial evidence, the Commission, driven compulsively by its own arguments, asserts that:

“Even some of the papers within the product line [the Census coarse paper grades] might have been

selected as separate lines of commerce.” (Comm. Br. 128)

pointing out that:

“ . . . converters do not buy wrapping paper and . . . therefore, wrapping paper is sold in a market different from that in which converting papers are sold.” (Comm. Br. 128n)*

It then argues that:

“ . . . the product-line papers [the Census coarse paper grades] have different end uses and therefore different characteristics.” (Comm. Br. 129)

that:

“ . . . there is *no* substitutability in use among ‘great many Census coarse papers.’ ” (Comm. Br. 130n)

that among the Census coarse paper grades, where strength is decisive, those made from kraft (sulphate) pulp are not competitive with those made from sulphite pulp (Comm. Br. 140) and, finally, that: “A buyer who needs shipping-sack paper ‘cannot make do’ with wrapping paper and vice-versa.” (Comm. Br. 199).

This is an astonishing argument. The Commission made no findings whatsoever respecting any such alleged lines of commerce. In fact, some of these very same alleged lines of commerce were proposed by Commission counsel below and rejected.

* On the basis of the Commission’s arguments in this Court, “wrapping paper” would constitute not one but several lines of commerce. The Census sub-sub-category “wrapping paper” includes grocery wraps, butcher paper (which has special blood-proofing qualities; R 2028 [Oberdorfer]; Comm. Br. 96) and specialty wrapping paper used for gift wrappings (RX 62, pp. 38-39, 41).

Commission counsel requested the Hearing Examiner to find that wrapping paper constituted a separate line of commerce, that kraft envelope paper constituted a separate line of commerce, and that kraft gumming paper, kraft waxing paper, kraft grocery bag paper and butcher paper each constituted a separate line of commerce (R 336-337).*

The Hearing Examiner, however, refused to make such findings and found instead that "Census coarse paper" (including not only kraft but sulphite papers) was the relevant line of commerce (R 589-590), and the Commission adopted the finding of the Hearing Examiner (R 605, 608-612).

The many fragmentary lines of commerce proposed by Commission counsel and rejected by the Hearing Examiner and the Commission cannot, of course, be resurrected here.

Furthermore, the Supreme Court unequivocally held in the *General Motors* case, *United States v. E. I. du Pont de Nemours & Co.*, 353 U. S. 586, 595 (1957), that Section 7 requires that:

"The market affected must be substantial."

In an attempt to comply with this holding, the Commission in its opinion stated that the market it found—the alleged western market for *all* of the Census coarse paper grades—was a substantial market (R 613).

The Commission, however, does not even attempt to answer the demonstration in our main brief that its alleged western "Census coarse paper" market is *not substantial* (Pet. Br. 244-246); *General Motors* even more clearly forbids an order addressed to only fragments of an insubstantial market.

As demonstrated above, the Commission has conceded that "Census coarse paper" is not a line of commerce.

* Commission counsel never requested the Hearing Examiner to find that "Census coarse paper" constituted a line of commerce.

The Commission's diversionary attack on Crown's proposed trade coarse paper line of commerce, to which we now turn, was not as successful as the Commission's attack on its own line of commerce.

B. The Commission unsuccessfully challenges the proof that trade coarse paper is the relevant line of commerce.

The Commission attacks our demonstration that trade coarse papers are made from the same raw materials, in the same mills and on the same machines, and are sold in a single market (Comm. Br. 93-94). However, as demonstrated below, each of our claims is fully substantiated by the evidence.

1. Trade coarse papers are made from the same raw materials.

St. Helens had a single raw material which it used to make all of its papers, *i.e.*, kraft wood pulp (R 2006 [Oberdorfer]). From this raw material it made papers classified by the Census as Census coarse paper, Census sanitary tissue stock, Census tissue paper except sanitary and thin, Census container board, Census special industrial paper, Census bending board, and Census special paperboard stock, all of which are trade coarse papers (Pet. Br. 48-49).

St. Regis, at Tacoma, Washington, which also made its paper from kraft wood pulp (R 2615), produced not only papers classified as Census coarse paper, but other trade coarse papers such as Census container board, Census special industrial paper, Census bending board and Census special paperboard stock (Pet. Br. 161).

Western Kraft at Albany, Oregon and Longview Fibre at Longview, Washington produce Census coarse paper grades and Census paperboard grades from kraft (sulphate) wood pulp (Pet. Br. 161; R 1564 [Zellerbach], 1742 [Wollenberg]).

Publishers Paper at Oregon City, Oregon uses the contrasting sulphite process for converting wood into wood pulp, and uses its sulphite wood pulp to produce Census coarse papers, Census sanitary tissue and Census tissue paper except sanitary and thin (Pet. Br. 161; R 2245-2246, 2248).

Crown uses both kraft and sulphite wood pulp to produce its trade coarse papers (Pet. Br. 161; R 1521 [Zellerbach]; CX 4, p. 19 [1733]).

In short, wood pulp, whether made by the kraft or the sulphite process, is the basic raw material from which western mills produce not only the Census coarse paper grades but also the other grades of trade coarse paper.

The Commission argues in opposition that "the pulps differ for different papers" because of differences in refining and in the addition of sizing or dyes (Comm. Br. 93, 95-96, 99-100, 102-103, 110, 137-138).

This argument, however, cannot be seriously advanced because the Commission itself has made specific findings squarely to the contrary (R 567-572). The Commission has found that different strength or porosity characteristics can be obtained by variations in the beating or preparation of the pulp, that dyes can be added to produce a complete range of colored papers and that sizing can be added either in the stock solution or at a size press and, after a series of findings substantiating the flexibility of the paper production equipment, that:

"Only rarely is special equipment required for the production of any grade of trade coarse paper."
(R 571)

The Commission also argues that

"... even as between wood pulp, sulphite pulp is not competitive with sulphate (kraft) pulp where strength is a decisive factor" (Comm. Br. 140)

The fact that for some uses one type of wood pulp is preferred over the other does not separate kraft papers and sulphite papers into separate lines of commerce. If, however, papers made from kraft pulp are in a different line of commerce from papers made from sulphite pulp, the Commission's Census coarse paper line of commerce finding, which includes *both* kraft and sulphite papers (RX 62, pp. 38-42), would have to be rejected for that reason alone.

The Commission's last assertion is that a higher proportion of wood pulp goes into the manufacture of Census coarse paper grades than into the production of paperboard, while a higher proportion of other fibrous materials, principally waste materials, is commonly used in the production of some paperboards (Comm. Br. 109-110, 139-140). Again, the Commission ignores one of its own findings, to wit, that almost all of the trade coarse papers produced in the West (which includes paperboard) are made from wood pulp, and not from waste paper or other non-wood pulps (R 570).

2. Trade coarse papers are made in the same mills.

The Commission argues that trade coarse papers are not made in the same mills because

“there is marked specialization among mills in the particular papers which they produce.” (Comm. Br. 94, 136)

The Commission cites no evidence in the record to support this claim because none exists.

St. Helens made a wide variety of trade coarse papers in its one small mill, and this was typical of every mill for which there are facts in evidence. Not a single mill produces *only* the Census coarse paper grades which constitute the Commission's line of commerce. (Pet. Br. 161-162)

3. Trade coarse papers are made on the same machines.

The main thrust of the Commission's attack is centered here. It claims that (i) the flexibility of the Fourdrinier machine, permitting a mill owner to change grades "at the flip of a lever", is a "deliberately misconceived assumption" of ours (Comm. Br. 188)*, (ii) paper machines produce limited, specialized lines of paper and, therefore, our claim that a mill owner will change his pattern of production in response to changes in the relative profitability of producing different grades of paper is also a "deliberately misconceived assumption" (Comm. Br. 94, 188), and (iii) in any event, machine flexibility is an irrelevant consideration in a Section 7 case (Comm. Br. 133-135). Each of these assertions is wholly without merit.

(i) *The flexibility of the Fourdrinier paper machine is not an issue in this Court; it was proved at the hearing and found as a fact by the Commission:* The Hearing Examiner made detailed and extensive findings in which the proved flexibility of the Fourdrinier paper machine was expressly found (Pet. Br. 51-55; R 567-572) and, in his Conclusion 19, he stated that the "flexibility of these machines is recognized" (R 595).

On appeal, the Commission adopted these findings and this conclusion of the Hearing Examiner (R 605).

In total disregard of its own findings, the Commission now calls the fact of flexibility a "deliberately misconceived assumption" of ours (Comm. Br. 188). It asserts that Mr.

* The phrase, "at the flip of a lever", is the Commission's and not ours. What we stated was that only simple adjustments of the production equipment (not only of the machine as the Commission claims in its footnote on page 196) are necessary to obtain the different characteristics of the various grades of trade coarse papers, and that it is not even necessary to stop the machine in order to make such changes (Pet. Br. 186). This statement is fully proved in the record (R 3631-3651).

John E. Goodwillie, the expert witness upon whose testimony its own findings of flexibility are primarily based, was not qualified to give his expert testimony because his company only manufactures machines and is not a producer of paper (Comm. Br. 193n).^{*} We submit that no one reading Mr. Goodwillie's testimony could doubt his qualifications (R 3508 *et seq.*).^{**}

The flexibility of the paper machine destroys the Commission's Census coarse paper line of commerce; it is the unifying competitive factor which proves that the line of commerce is trade coarse paper and not the narrow range of papers included in the artificial "Census coarse paper" statistical classification (Pet. Br. 158-169, 180-187).

With respect to our contention that trade coarse papers are made on the same machines, and the Commission's belated claim in this Court to the contrary, we refer the Court to the following finding of the Commission:

"53. All 81 Fourdrinier machines in the West now producing paper and paperboard can make 40-pound paper, and 58 of them can also make 126-pound paper. Only rarely is special equipment required for the production of any grade of trade coarse paper. A size press is desirable for certain grades, and most modern machines in the West have a size press; when they do not, the size can be added

* Mr. Goodwillie is vice president of Beloit Iron Works, which is probably the largest paper machine manufacturer in the country (R 3508, 3511).

** In this connection, the Commission also charges that Crown "abstained from calling the man who makes the paper, presumably for reasons known best to [it]." (Comm. Br. 198). The charge is belied by the record. Crown called as a witness Mr. Reed O. Hunt, then the vice president of Crown in charge of production, *i.e.*, the making of paper (R 2940-3031). Mr. Hunt also testified as a Commission witness (R 1784-1853).

to the pulp before it reaches the machine headbox.”
(R 571-572; see also Pet. Br. 51-55, 162-163)

(ii) *Paper machines do not produce limited, specialized lines of paper and it is economically practical for a mill owner to change the pattern of his production:* St. Helens, on its two machines, alternately produced Census coarse paper grades and papers falling in several other Census statistical subcategories of trade coarse paper (Pet. Br. 47-48, 162).

St. Regis, on its single paper machine at Tacoma, Washington, produced not only Census coarse paper grades but also other trade coarse papers such as linerboard, corrugating medium, cup lid stock, food container stock, tag stock, absorbent paper, special coating board and can stock (R 2616-2618).

Western Kraft, at Albany, Oregon, produces bag paper (a Census coarse paper grade) and linerboard (a trade but not a Census coarse paper grade) on its one Fourdrinier machine (RX 95 [5119]), as does Weyerhaeuser on its No. 3 machine at Longview, Washington (R 2625-2626).

Similarly, Longview's No. 5 machine and its new No. 7 machine at Longview, Washington, are “dual purpose machines and they might be by our [Longview's] choice used either for [Census] coarse paper or paperboard [a trade but not Census coarse paper grade]” (R 1744, 1766 [Wollenberg]; see also RX 87, pp. 43-44; R 2130, 2133, 2249-2250, 2596-2598, 2607-2608, 2910-2911, 2914-2915 and 3286-3290, 3346-3350 [Pier]).

Further evidence that paper machines do not produce limited grades of paper is the fact that it is almost as common for a Fourdrinier machine to produce both paper and paperboard in any given week (*i.e.*, what is known as a “fluctuating” Fourdrinier) as it is for the machine to

produce paper exclusively or paperboard exclusively (RX 87, pp. 18-19, 43-44; R 3286-3291, 3346, 3350 [Pier]).*

With respect to the question whether it is economically practical for a mill to change the pattern of its production, the Commission asserts that:

“ . . . the mill owner will [not] *promptly* change his pattern of production with changes in the relative profitability of producing different grades of paper.” (Comm. Br. 188; italics added)

To support this assertion, the Commission first cites the testimony of Mr. Wollenberg, Longview's President, that he “wouldn't necessarily go into a more profitable development if it broke up the line tha[t] we need to serve, and which would be a short time profit against a long term policy” (Comm. Br. 189).

The Commission does not refer, however, to the Longview Annual Report (CX 76 [3043]), in which Mr. Wollenberg states that Longview leaves two of its machines flexible to produce paper or container board “as sales opportunities demand”. Nor does the Commission refer to the testimony of Mr. Wollenberg immediately following the part it quotes, in which Mr. Wollenberg states that he would have no hesitancy in adding additional bleaching capacity if he saw a long term trend toward the bleached papers (R 1770).

Similarly, the Commission, in quoting the testimony of Mr. Robinson of Publishers Paper Company (Comm. Br. 190), omits his testimony that since his machines are flex-

* Of the 45 fluctuating Fourdrinier machines for which week-by-week production data are set forth in the evidence cited above, 11 are located in the West (including St. Helens' No. 1 machine); nine are classified as fluctuating regularly between paper and paperboard and two are classified as fluctuating only casually (R 3286-3291, 3346, 3350 [Pier]).

ible, he could run wrapping paper instead of newsprint if wrapping paper became more desirable (R 2250).

Likewise, the Commission fails to refer to all of the testimony given on behalf of Columbia River of Vancouver, Washington and Salem, Oregon (Comm. Br. 190), particularly that part of the testimony which discloses that Columbia River, if it thought it desirable, could change the products presently produced by its machines to others which its machines could produce (R 2133).

The Commission incorrectly limits its consideration to the alleged immediate short run consequences of temporary market conditions. A mill may be unwilling to discontinue its present grades of paper and its present customers for a temporary advantage arising from the fact that one grade of paper is temporarily more profitable than another but, as the testimony in the record but not quoted by the Commission shows, a mill will change its pattern of production for a long run advantage (*e.g.*, CX 76 [3043]; R 2133, 2250).

A Clayton Act order cannot be based solely upon the short term inertia of sellers or buyers; it must be based on long run probabilities. This was squarely held in *American Crystal Sugar*:

“We hold that only an acquisition which *in the long run* may reasonably be expected to substantially lessen competition within a relevant market, would violate §7 as amended.” (259 F. 2d, at 527; italics added)

Thus, *American Crystal Sugar* makes completely irrelevant the Commission’s assertion that a paper mill will not “promptly” shift its production from one grade of trade coarse paper to another, where the evidence is conclusive, as it is here, that shifting is not only feasible but customary in the industry.

The Commission also suggests that paper machines are built with narrow optimum basis weight ranges and that therefore they can be operated economically only within that narrow range (Comm. Br. 196-198). To support this claim the Commission cites selected bits of testimony. The testimony not cited, however, dispels the Commission's misleading implication. For example, the very next question and answer following the quoted testimony of Mr. Goodwillie (Comm. Br. 196-197) is:

“Q. Well, are not paper machines designed to have optimum range for the products that the operators want to produce? A. I think I should answer that question no, and go on with the explanation that in the ordinary course of events a paper mill would want to have built into their machine the maximum degree of flexibility that could be incorporated within limits where extending the range or extending the flexibility would be done at no increase in cost. . . .” (R 3732)*

(iii) *The flexibility of paper producing equipment is a highly relevant consideration in a Section 7 case:* The Commission's main argument against defining the line of commerce in terms of the products which a typical paper mill can alternatively, and as easily, produce is that such a definition is based upon the decision of the Supreme Court in *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948), which decision, the Commission claims, was repudiated by the Congress when it amended Section 7 in 1950.

The Commission cites as authority a dictum in *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F. 2d 738, 741 (2d Cir. 1953), that “we believe the amendment of Section 7 in 1950 certainly casts doubt” on *Columbia Steel* (Comm. Br.

* See also, the *full* statement in RX 92A, pp. 393-394, instead of just the part quoted by the Commission (Comm. Br. 198).

26),* and a dictum in a footnote in *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S. D. N. Y. 1958), that the definition of the product market on the basis of production flexibility is not controlling in a horizontal merger case under Section 7 of the Clayton Act (Comm. Br. 133-135).

The legislative history of Section 7, as amended, (parts of which are referred to at Comm. Br. 24-25) merely points out that the *ultimate conclusion* of *Columbia Steel* might be different today, because an action today would be under Section 7 of the Clayton Act where the Government has to prove only that the acquisition "may tend" substantially to lessen competition, rather than under Sections 1 or 2 of the Sherman Act, which require proof of an actual restraint of trade or monopoly.

Nothing in the legislative history, however, casts the slightest doubt on the holding of *Columbia Steel* with respect to *market definition*.

The dictum in one of the footnotes in *Bethlehem Steel* is of no aid to the Commission because the *holding* in *Bethlehem Steel* is consistent only with a trade coarse paper line of commerce.

Judge Weinfeld found that hot rolled steel, cold rolled steel, hot rolled bars, track spikes, tin plate, butt weld pipe, electric weld pipe and seamless pipe each represented a separate line of commerce (168 F. Supp., at 618-619). The

* It should be noted that that Court thought doubt had also been cast on *International Shoe Co. v. FTC*, 280 U. S. 291 (1930). Not only is the legislative history of Section 7, as amended, expressly to the contrary (Pet. Br. 242-243, 278), but the *International Shoe* doctrine was recently applied in *United States v. Maryland & Va. Milk Producers Ass'n, Inc.*, 167 F. Supp. 799, 808-809 (D. D. C. 1958), probable jurisdiction noted, 28 U. S. L. Week 3002 (No. 62). The Department of Justice also is of the opinion that *International Shoe* applies to the amended Section 7 (Pet. Br. 279).

significant fact for purposes of our case is that *each* of these lines of commerce included *all of the products which could be made on the same production equipment, irrespective of thickness, specifications, uses or prices.*

Thus, for example, Judge Weinfeld found that hot rolled bars, which are made in a bar mill, was a line of commerce even though hot rolled bars came in

“various sizes, shapes and forms, including rounds, ovals, hexagons, octagons, flats, squares, round cornered squares and special non-standard bar sections and also structural angles, channels, tees and other light structural shapes.” (Finding 181)

Likewise, he found that seamless pipe was “produced on a different type of mill and by an entirely different process than that used for the production of other steel tubular products” and that it was a single line of commerce although seamless pipe ranges in size from a hypodermic needle to about 22 inches in diameter (Pet. Br. 158n).

Trade coarse paper is comparable to hot rolled bars, seamless pipe, etc.; it too represents products which can be interchangeably made on the same production equipment. In both instances, the common, unifying element for *inclusion* of products in the same market is the flexibility of the production equipment, *i.e.*, the ability to produce a variety of products on the same production equipment.

Furthermore, Judge Weinfeld’s dictum respecting *Columbia Steel*, that he thinks the standard for determining the product market might be different under Section 7 than under the Sherman Act (Comm. Br. 134-135), is squarely contradicted by the holding in *American Crystal Sugar*. In *American Crystal Sugar*, a Clayton Act Section 7 case, the Second Circuit (295 F. 2d, at 529) expressly followed the approach to market definition employed by the Supreme

Court in *Cellophane*, a Sherman Act case.* Thus, the standard for determining the product market is the same under the Sherman Act as it is under the Clayton Act.

The two statutes may yield different results because one (the Sherman Act) requires proof of a restraint of trade or monopoly, whereas the other (Section 7) is satisfied by proof that there may be a substantial lessening of competition, but the differences in these standards are irrelevant in determining the market to which the complaint, under either statute, must be addressed.

4. Trade coarse papers are sold in the same market.

In our main brief, we demonstrated that, although the specific grades of trade coarse paper might differ from one another in weight, thickness, color, finish and other physical characteristics, these variations are easily obtainable by simple adjustments of the manufacturer's paper production equipment and that, therefore, from the point of view of the paper purchaser (including the purchaser of Census coarse paper grades), the supply side of the market is represented by all the mills which supply trade coarse papers (Pet. Br. 182-187, 191-192). Consistently, the record discloses that *no* mill produces or sells only Census coarse paper grades (see Pet. Br. 160-163).

The purchasers of the various papers classified as Census coarse paper, as well as the purchasers of the other trade coarse papers, constitute the demand side of the market because they all compete for the output of the same mills.

* *United States v. E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956). This holding in *American Crystal Sugar* should be compared with the Commission's claim in this Court that the *Cellophane* market approach, like the *Columbia Steel* market approach, is inapplicable in a Section 7 case (Comm. Br. 130-133).

Thus, the same logic that led the Courts in *Columbia Steel* and *Bethlehem Steel* to include in a single line of commerce all products interchangeably made on the same equipment, compels the conclusion that trade coarse paper is sold in a single market.

The unifying factor is that the suppliers of the Census coarse paper grades are also the suppliers of the other trade coarse papers and that therefore the supply, demand and demand price for each of these grades of papers is directly influenced by the supply, demand and demand price for each of the others (Pet. Br. 165-169, 191-192, 207-208).*

Consistently, Mr. Beggs of the Stanford Research Institute, an expert witness for Crown, testified that the market in which papers classified as Census coarse paper are sold

* The Commission challenges the fact that the price and supply of the various trade coarse papers are very closely linked together, pointing out (i) that for four specific grades of paper and three specific grades of paperboard there has been less than completely parallel price movement and (ii) that paper prices are determined by competition rather than on the cost of production (Comm. Br. 118-127).

The Commission misses the point entirely: The fact that prices for the different trade coarse papers are based upon market competition rather than on production costs indicates the inter-relationship of the demands for different grades of paper. If each separate grade of paper were sold in a separate market, uninfluenced by the demand and demand price for any other grade of paper, then alone would it be expected that prices would be based on cost of production without reference to competition.

Furthermore, the statistics not cited by the Commission destroy its conclusion. The wholesale price index numbers for *all* paper (except newsprint) and *all* paperboard, as distinguished from the ones for the particular grades of paper and paperboard cited by the Commission, disclose that the price indexes for the two groups moved in general together and finished the eight-year period with about equal advances in price (RX 103, p. 23 [5195]).

must also include the other trade coarse papers, *i.e.*, Census container board, Census tissue papers, Census special industrial paper, etc. Dr. Barnes, the Commission's economist, testified that competition in the sale of Census coarse papers could not be analyzed without taking into account the other trade coarse papers.* (Pet. Br. 166-169, 207-208; RX 92A, pp. 36-37, 471-472; R 1178-1179 [Barnes], 4115-4116 [Beggs], 5219 [Barnes])

Two final observations on the market where trade coarse papers are sold: In its opinion below, the Commission asserted that the Census coarse paper grades represent a market for flexible packaging materials (R 610). In our main brief, however, we demonstrated that the market for "flexible packaging materials" cannot be confined to the Census coarse paper grades (Pet. Br. 189-191). The Commission's silence with respect to its "flexible packaging materials" argument is the best evidence that it has now abandoned one of the only two crutches it relied on to support its assertion that "markets . . . tend to distinguish [Census coarse] papers" (Pet. Br. 187).

Lastly, we note how the Commission misstates the thrust of our contention that uses do not distinguish papers within the Census coarse paper classification from other trade coarse papers.

The Commission accuses us of engaging in "tactics" directed to making this Court believe that papers which are *classified* for particular uses are actually used for other purposes (Comm. Br. 96-97, 100, 106, 133). Although we noted in one paragraph a few instances where paper *classified* for a particular use was actually used for a different purpose (Pet. Br. 199-200), the point we were making, which the Commission never answers, is that it is economically unrealistic to attempt to distinguish papers on the

* The reason given by the Commission's economist was that these papers are "closely related on the supply side" (R 5219).

basis of use, because the same paper can be used for many different purposes (Pet. Br. 197-201).

For example, if a customer wants paper to make shipping cartons, he asks his mill for paper to make shipping cartons. *Only the fact that the paper is used to make shipping cartons makes it a "Census container board" grade*, because the Census grade classification is based on use and not on the physical characteristics of the paper. If *the same paper were used to manufacture shipping sacks, that use would make it a "Census coarse paper" grade* according to the Census classification. (Pet. Br. 198)

The identical point is made in *The Dictionary of Paper* (1951 ed.), p. 2:

"... there is the possibility of describing a paper in terms of its use. For example, a Multigraph paper might be defined as a paper which is used in the Multigraph process; butchers wrap as a paper which is used for wrapping meat. There is nothing particularly revealing, however, in this sort of definition. Generally, it may be expected to leave the reader utterly confused, as it is possible for a given kind of paper to qualify for an unpredictable number of uses. In addition to their ineffectuality, therefore, descriptions based solely on use are bound to be incomplete as well as dated."

C. Conclusion—The Commission has confessed error in its Census coarse paper line of commerce finding.

The Commission's dilemma on this appeal is that it cannot exploit the differences in physical characteristics, uses and prices between the Census coarse paper grades on the one hand, and the other trade coarse papers on the other hand, without destroying its finding that the Census coarse paper grades constitute a rational line of commerce. The dilemma arises because the differences *between* papers

classified as Census coarse paper, on the one hand, and papers classified as Census container board, Census tissue paper, Census special industrial paper, etc., on the other hand, are the same as those which exist *among* the Census coarse paper grades.

The unifying factor among the papers classified as Census coarse paper—that they are made from the same raw materials, in the same mills and on the same machines, and are sold in the same market—requires inclusion in a single line of commerce of *all* the trade coarse papers, as contended by Petitioner and proved by the substantial evidence in the record.

Thus, the Commission's crucial "Census coarse paper" line of commerce finding is not only not supported by substantial evidence on the whole record in accordance with the requirements of Section 11 of the Clayton Act, as amended, and Sections 7(c) and 10(e) of the Administrative Procedure Act, but is contrary to the evidence. The Commission's order, therefore, must be reversed.

POINT II

The Commission has failed to support its finding that the 11 western states constitute the relevant section of the country.

We pointed out in our main brief that the Commission relied on irrelevant and incorrect statistics to support its finding that the 11 western states constitute the appropriate geographic market area ("section of the country"), that the Commission completely ignored the actual sales patterns of Crown and St. Helens, and that the Commission relied upon its unsupported assertion that only "insignificant" quantities of Census coarse paper grades were sold in the West by eastern and southern paper mills (Pet. Br. 24-30, 208-232).

The Commission's answering brief does not deny that its statistics were irrelevant and incorrect*, continues to ignore the actual sales patterns of Crown and St. Helens, and offers no factual support for its claim that only "insignificant" quantities of paper were sold in the West by eastern and southern mills (Comm. Br. 36-37, 140-174).

A. The pattern of sales of Crown and St. Helens precludes a geographic market limited to the 11 western states.

The Commission is silent on the demonstration in our main brief that its choice of the 11 western states as the

* The Commission does not deny that it was incorrect in stating in its opinion that Crown sold 77% of its wrapping paper in the West (it was only 56%) and in referring in its opinion to where Crown sold some of its trade coarse papers, instead of limiting its discussion to Crown's sales of the narrowly-defined Census coarse paper grades (Pet. Br. 26-27).

The Commission also stated below that 85% of St. Helens' domestic sales of Census coarse paper grades were made in the West (R 612). The Commission's brief restates this figure at 81.5% (Comm. Br. 145). The Commission's new figure of 81.5% is still too high (cf. Pet. Br. 25, 210-211). The Commission refers to the testimony of Mr. Oberdorfer, St. Helens' former president, that a paper called "natural converting kraft" is "used primarily in the manufacture of can containers for empty tin cans" (R 2044). This testimony does not prove, as the Commission claims, that a paper called "Canco converting" is one of the converting papers classified as Census coarse paper (Comm. Br. 146n). Furthermore, the Commission's assertion that St. Helens sold 469 tons of "asphalting paper" (Comm. Br. table facing p. 145), a Census coarse paper grade, is made in the face of the fact that the St. Helens' sales analysis discloses no sales of "asphalting paper" and St. Helens' production records indicate that it produced no asphalting paper (CX 117; CX 168A [4049]).

The Commission's assertion that 85.2% of Crown's domestic sales of Census coarse paper grades were made in the West depends on the Commission's including as sales approximately 32,000 tons of intra-corporate transfers between Crown's paper mills and its converting plants, and approximately 10,000 tons of sales to a wholly-owned subsidiary (Comm. Br. 144, 169).

geographic area of effective competition was precluded by the actual pattern of sales by Crown and St. Helens (Pet. Br. 210-214). Instead, the Commission talks exclusively about where these companies sold "the bulk" of their Census coarse paper grades (Comm. Br. 34, 36, 141, 149).*

"The bulk" of St. Helens' sales of papers classified as Census coarse paper was made in the 11 western states, but it is equally true that "the bulk" of St. Helens' sales was made in California, Washington, Oregon, Texas, Colorado and Missouri (an aggregate of 27,480 tons for those six states, as opposed to 26,709 tons for the 11 western states) (Pet. Br. 210-211; CX 117). Texas and Missouri are not in the 11 western states as defined by the Commission.

* The Commission seeks to convey the incorrect impression that its "bulk" sales theory is supported by *American Crystal Sugar Co. v. The Cuban-American Sugar Co.*, 152 F. Supp. 387 (S. D. N. Y. 1957), aff'd, 259 F.2d 524 (2d Cir. 1958) (Comm. Br. 143, 149, 167n). In that case, the Court found that a certain 10-state area was the relevant section of the country because that was a "price-conscious industrial sugar market" in which the parties were "prime forces" and in especially active competition, and because it was a market "subject to common economic forces" (259 F. 2d, at 527-529). The "common economic forces", and the factor which segregated that area from the rest of the country and made it an "area of effective competition", was not the fact that the parties made a given percentage of their sales there, but the fact that the sales price of the relevant product was lower in that 10-state area than in any other part of the country (152 F. Supp., at 391). That is not the situation in our case; the undisputed fact is that trade coarse papers (including Census coarse papers), no matter where produced, sell at uniform prices throughout the United States, except for upcharges—by eastern and western producers alike—for some grades in the more sparsely populated areas of Montana, Idaho, Nevada, Utah and Arizona (R 1483-1487 and 1671-1679, 1682 [Ticoulat], 2543 [Long]; RX 70-74 [4910-4917]). (The Commission's statement that "As Crown went East its prices increased in some areas" (Comm. Br. 150n) relates only to the upcharges in those five intermountain states.)

The Commission's "bulk" argument cannot justify including the five "western" states of Nevada, Wyoming, New Mexico, Idaho and Montana, where St. Helens' aggregate sales were only 270 tons, and excluding the non-"western" states of Texas, Missouri, Minnesota, Louisiana and Oklahoma, where St. Helens' aggregate sales were 2,816 tons (Pet. Br. 211-212; CX 117).

"The bulk" of Crown's sales of Census coarse paper grades was made in California, Texas and Washington, which three states accounted for 53,326 tons of Crown's total of 70,687 tons of domestic sales of Census coarse paper grades (Pet. Br. 212-213; CX 36A-Z18 [2276-2318]).*

Thus, the Commission's "bulk" argument does not supply the substantial evidence needed to support its finding that the 11 western states are the relevant section of the country within the meaning of Section 7, particularly as St. Helens' and Crown's general pattern of sales indicates a market comprising the 22 states west of the Mississippi River (Pet. Br. 210-214; CX 36A-Z18 [2276-2318]; CX 117).

B. The Commission's geographic market cannot be supported by its unproved and unsupportable assertion that sales in the 11 western states by producers outside that area were "insignificant".

The Commission states, and reiterates throughout its brief, that shipments of Census coarse paper grades into the 11 western states from other parts of the country were insignificant (Comm. Br. 42-43, 58, 149-166). The Commis-

* The Commission incorrectly states that we went outside the record in arriving at the figure we use for Crown's western sales of shipping sack paper (Comm. Br. 144). We designated as shipping sack paper Crown's sales of bag paper which were reported in the Crown sales analysis (CX 36 [2276 *et seq.*]) as having been made to western shipping sack converters (Ames, Harris & Neville, Fulton, St. Regis and Bemis; R 1661). Evidently, these sales are shipping sack paper (a shipping sack is a "bag" in common parlance) and not "bag paper" as defined by the Census.

sion does not, however, support this assertion by reference to substantial evidence in the record.

There is no evidence as to where customers in eight of the 11 western states (the eight Mountain states) buy their Census coarse paper grades, and the Commission does not deny this.

There is no evidence as to where western wholesale grocers, chain stores, co-operatives and consumers buy their Census coarse paper grades, and the Commission does not claim that there is.

There is hardly any evidence with respect to where western converters, who buy 80% of the Census coarse paper grades (*i.e.*, all Census coarse paper grades other than wrapping paper; see RX 62, pp. 10-11), buy their Census coarse paper grades, and the Commission does not claim otherwise.

The Commission's principal evidence relates only to wrapping paper and particularly to the purchases of wrapping paper by a few jobbers in the three Pacific Coast states (*e.g.*, Comm. Br. 152-156), but even this evidence does not support the Commission's conclusion that shipments of Census coarse paper grades into the West were "insignificant" (Pet. App. 19-36; Pet. Br. 220-225).

Thus, for example, under the heading "The freight advantage" (Comm. Br. 149-156), the Commission refers only to freight rates on shipments of wrapping paper, but significantly draws its conclusion with respect to *all* Census coarse paper grades (Comm. Br. 149-151). Even with respect to wrapping paper, however, the Commission ignores the fact that western mills do not have a freight advantage in supplying all of the 11 western states and that Crown and St. Helens absorbed freight on shipments to Texas and up to the Mississippi River, the cost of which would permit eastern and southern mills to ship anywhere in the West (Pet. Br. 225-227; RX 66A [4901]; RX 69B [4908]; R 3781-3782, 3800-3801 [Ticoulat]).

Under the heading "Shipping time, dependable source of supply and full coarse paper product line" (Comm. Br. 156-166), the Commission relies basically on the testimony of three Pacific Coast paper jobbers (*i.e.*, purchasers of wrapping paper; Pet. Br. 248, 251). The Commission does not claim, however, that western mills have a shipping time advantage, even on wrapping paper, to states like Colorado, Arizona and New Mexico, or that there is any evidence that eastern and southern mills would be less dependable sources of supply or offer a less "full" product line in those states.

Moreover, the Commission ignores the evidence that at least 64 non-western producers of paper sell in the West (despite freight and other supposed handicaps), that at least 25 of them sell Census coarse paper grades in the West, and that the national pattern of paper prices is inconsistent with an isolated western market (Pet. Br. 217-219, 227-228).

Even with respect to wrapping paper, there is evidence in the record of large and important shipments into the West. An I. C. C. waybill analysis indicates shipments of wrapping paper into the West by southern and eastern producers substantially in excess of St. Helens' sales of wrapping paper in the West (Pet. Br. 215-217; CX 85A-C [3079-3081]; RX 84A [5018]).

This I. C. C. waybill analysis also discloses very substantial shipments of other papers into the West, although the record does not permit a breakdown of these sales between Census coarse paper grades and other grades of paper (Pet. Br. 216; RX 84A-B[5018-5019]). This evidence is sufficient, however, to prove conclusively that the West is not an isolated market dependent upon western producers.*

* The Commission relies heavily on this I. C. C. waybill analysis to support its findings (Comm. Br. 163-164, 168). However, it seeks to discredit the analysis where it proves substantial shipments by eastern and southern mills into the West (Comm. Br. 165, 185n). The I. C. C. waybill analysis was put in evi-

C. There is a complete lack of evidence as to purchases in the eight Mountain states.

We pointed out in our main brief that any conclusion with respect to where purchasers of Census coarse paper grades in the eight Mountain states bought their paper could be based only on the biased and discredited survey which the Commission directed to be admitted in evidence and which the Commission now claims not to have relied upon (Pet. Br. 146-147, 228-229; Pet. App. 19-36). The Commission does not contest this showing and offers no reference to any other evidence which could support a finding with respect to these eight states.*

There is no substantial evidence on the whole record to support the Commission's finding that the 11 western states constitute the relevant geographic area of effective competition, *i.e.*, "section of the country".

dence by the Commission (R 1971, 1988-1989) and, even though the I. C. C. tonnage figures appear not to be precisely comparable to other figures in the record, the analysis indicates an order of magnitude which fully supports the conclusion of very substantial shipments by eastern and southern mills into the 11 western states.

* Challenged to point to evidence from *purchasers* in the eight Mountain states, the Commission refers only to (Comm. Br. 171-173): Hudson's western *selling* agent who *sold* only in California and a "little" in Nevada (R 2886); St. Helens' *selling* agent, Graham Paper Company, which *sold* basically in only seven of the 11 western states (R 2529 [Long]); Cupples Company, a *selling* agent for Publisher's and Crown, which *sold* in only nine of the 11 western states (R 1487-1488); Blake, Moffitt & Towne, Longview's principal jobbing outlet, which conducted business principally in the Pacific Coast states and had branches in three of the eight Mountain states (CX 67 [2997]); and Zellerbach Paper Company, Crown's jobber subsidiary, which conducted business principally in the Pacific Coast states and had branches in five of the eight Mountain states (CX 35 [2274]).

POINT III

The Commission cannot support, by substantial evidence on the whole record, its finding that the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the sale of "Census coarse papers" in the 11 western states.

The Commission discusses "competition" solely in terms of the *production* of Census coarse paper grades in Oregon, Washington and Idaho; any reference to the *sales* of Census coarse paper grades in the West by western and non-western producers is studiously avoided. Yet, even the Commission must concede that the concept of competition is concerned with the *purchase and sale* of papers and not only with their production.*

The reason the Commission discusses only production and ignores sales is perfectly clear: While Crown and St. Helens produced 280,251 tons of Census coarse paper grades in 1952, they *sold* only 81,868 tons in the West (Pet. Br. 33; CX 36A-Z18 [2276-2318]; CX 117; CX 168A [4049]), and large and important quantities of the Census coarse paper grades which were purchased by customers in the 11 western states were supplied by non-western producers (Pet. Br. 214-219).

The Commission's discussion of competition is further limited to only a few customers, to less than all of the grades of paper classified as Census coarse paper, and to only three of the 11 western states. Thus, the scope of its argumentation on competition is much narrower than the scope of its "market". In an attempt to hide this fact, the Commission discusses the alleged effects on competition (Point I of its brief) prior to and without reference to its

* If it were otherwise, the geographic "area of effective competition" would be Oregon, Washington and Idaho, where the paper is produced, and not the 11 western states.

discussion of the relevant market (Points II and III of its brief).

The Commission has in addition completely ignored the evidence in the record of the dynamic nature of the paper industry. The Commission does not deny that the paper industry in the West is one of continuing phenomenal growth, with vast supplies of pulpwood (the principal raw material for the manufacture of paper), great opportunity for new entry and expansion, and a concomitant continuing decline in concentration (Pet. Br. 58-69, 264-272).

Nor has the Commission successfully rebutted the evidence that the paper industry adjusts flexibly to meet changing market demands, that the number of competitors in the market increases each year, that St. Helens had planned largely to abandon its production and sale of Census coarse paper grades and that St. Helens was an ineffective competitor whose prospect of rehabilitation was remote (Pet. Br. 81-114, 266-281).

The Commission takes no cognizance whatsoever of the holding in *American Crystal Sugar* that:

“ . . . only an acquisition which *in the long run* may reasonably be expected to substantially lessen competition within a relevant market, will violate §7 as amended.” (259 Fed. 2d, at 527; italics added)

- A. **The Commission does not meet the issue whether the market it found is a substantial market. (See the holding of the Supreme Court in *General Motors* that Section 7 requires that “The market affected must be substantial” (353 U. S., at 595).)**

We demonstrated in our main brief that the Commission’s assumed western market for papers classified as Census coarse paper is not a substantial market (Pet. Br. 244-246). The Commission’s answer is silence.

In its opinion below, the Commission stated that its western Census coarse paper "market" was a substantial market because 437,384 tons of Census coarse paper grades were *produced* in the West in 1953 (R 613). In answer, we pointed out that western *sales* by western mills amounted to only 182,059 tons (Pet. Br. 244-245).^{*} Even adding the approximately 71,000 tons of Census coarse paper grades shipped into the West by southern and eastern producers (see p. 46n, *infra*), which the Commission steadfastly ignores, the Commission's order must be reversed because its conclusion of substantiality was based on a figure (437,384 tons) which was inflated over the evidence in the record by about 73%.

B. The Commission, confining itself to local production statistics, does not answer the statutory question whether there may be a substantial lessening of "competition".

In an attempt to excuse its reliance on production statistics, the Commission makes the mystifying statement that sales figures

" . . . obfuscates the real position of [Crown and St. Helens] as suppliers [*i.e.*, sellers] because Crown converted so much of its primary paper production and sold it in converted form." (Comm. Br. 56)

The Commission, however, arbitrarily excluded from its "Census coarse paper" line of commerce the products into which the papers in the Census coarse paper classification are converted (Pet. Br. 45-46; RX 62, pp. 38-42) and therefore it is *because* Crown, St. Helens and other western producers converted portions of their Census coarse paper grades into non-Census coarse paper converted products,

^{*} The Commission asserts that this is a "contrived estimated sales figure" (Comm. Br. 184-185), but it does not attempt to prove its assertion by reference to evidence in the record. Our estimate is fully substantiated by the record references in our main brief (pp. 244-245).

that *only* sales statistics disclose their "real position . . . as suppliers" of the arbitrarily selected Census coarse paper grades.

Furthermore, Crown and St. Helens, and other western Census coarse paper producers, sold additional portions of their paper *outside* the West, while eastern and southern mills were selling *into* the West (Pet. Br. 210-219).

Thus, any discussion which is limited to *local production* statistics necessarily produces a badly distorted picture of *competition* in the West. This can be graphically demonstrated by comparing the Commission's production figures with the evidence respecting sales.

1. The Commission improperly relies solely on production statistics to arrive at its share of the market and concentration percentages; the percentages disclosed by the sales statistics are very different and much lower.

The Commission recites that Crown and St. Helens together *produced* 62.5% of the Census coarse paper grades produced in the West and "that this clearly constituted a predominant share of the market" (Comm. Br. 44). Local production shares cannot, however, be equated with market shares, *i.e.*, sales; Crown and St. Helens *together* had a *maximum* share of the western market (*i.e.*, sales) of only 39% (Pet. Br. 246-247).*

* The Commission claims that our 39% figure is "completely misleading" because it includes 28,940 tons of wrapping paper imports (Comm. Br. 185n). *Although this figure is taken from a Commission exhibit*, the Commission now claims that it is too high (Comm. Br. 185; see also p. 41n, *supra*). On the contrary, the figure is too low because it does not include an unknown but large quantity of other shipments of Census coarse paper grades into the West by southern and eastern producers; total shipments into the West of all the papers classified as Census coarse paper must have far exceeded 28,940 tons. The evidence contains an estimate of consumption of Census coarse paper

The Commission next states that four companies accounted for 417,851 tons of western production of Census coarse paper grades out of total western production of 443,152 tons (Comm. Br. 44).

The Commission ignores the fact that these four companies accounted for only approximately 156,758 tons of *sales* of Census coarse paper grades in the 11 western states out of *minimum* total sales of approximately 210,999 tons (Pet. Br. 245-247). Thus, these four companies did not have a 94.3% share of the market as the Commission asserts, but less than 74%.

That production statistics are misleading is made even clearer when we examine the Commission's assertions respecting specific grades of paper classified as Census coarse paper.

2. Wrapping Paper

The Commission alleges that the acquisition gave Crown "a virtual monopoly in the supply of wrapping paper to jobbers generally" (Comm. Br. 46).

(i) Wrapping paper is sold not only to jobbers, but to wholesale grocers, chain stores, cooperatives and large consumers, and these other customers purchase much of the wrapping paper sold in the West. In 1952, Crown sold 11,658 tons of wrapping paper to independent jobbers in the West, 9,824 tons to its subsidiary Zellerbach Paper Company, and 11,606 tons to wholesale grocers, chain stores, etc. (CX 36A-Z6 [2276-2306]).

grades in the West in 1953 of approximately 480,000 tons; production of Census coarse paper grades in the West in 1953 (437,384 tons) less shipments out of the West (approximately 28,500 tons in 1952; no comparable figure available for 1953) amounted to only approximately 409,000 tons; thus, the evidence indicates that approximately 71,000 tons of Census coarse paper grades were shipped into the West in 1953 (RX 62, p. 23; RX 92A, p. 343; Pet. Br. 210, 212, 244-245).

The jobber and the wholesale grocer, chain store, etc., buy the same grade of paper and therefore compete with each other for the available wrapping paper supply. Thus, jobbers are not a "market" and no meaningful conclusion can be drawn from fragmentary data on where they (but not their competitors) buy their wrapping paper.

(ii) The Commission refers to jobbers "generally", despite the fact that there is no evidence from any paper purchaser in the eight Mountain states (eight of the 11 western states) with respect to where he buys his paper (Pet. Br. 228-229; p. 42, *supra*).

(iii) The Commission relies entirely on local western *production* statistics in arguing that Crown is the dominant *supplier* of wrapping paper to western jobbers. Thus, it recites Crown's and St. Helens' total 1952 wrapping paper *production* of 98,123 tons (Comm. Br. 45). The Commission fails to mention, however, that St. Helens and Crown together *sold* only 22,870 tons of wrapping paper to independent western jobbers in 1952 and that western jobbers bought wrapping paper from other western, as well as from non-western suppliers (Pet. Br. 215-221, 249n; CX 36A-Z6 [2276-2306]; CX 117).*

* In our Specification of Errors (Pet. App. 3-4), we complained of the Commission's statement that Crown produced 332,343 tons of wrapping paper. The Commission states that this "is of no particular significance" because the "finding is merely descriptive of Crown's over-all operations" (Comm. Br. 34n). It is nothing of the sort; the term "wrapping paper" is there used by Crown as including papers falling within the Census classifications of wrapping paper, bag paper, shipping sack paper, waxing paper, gumming paper, and many other grades of trade coarse paper. This is evident from the fact that Crown's production is lumped under only five categories: newsprint, other printing papers, wrapping paper, tissue and sanitary papers and board (CX 11, p. 18 [2000]). This broad use of the term "wrapping paper" (as opposed to the narrow usage by the Census) follows accepted trade practice (R 1918-1919).

A comparison of the production figures relied on by the Commission with the relevant sales figures follows:

Wrapping Paper — 1952 (tons)

Company	Production §	Western Sales to Jobbers #
Crown	71,444	11,658
St. Helens	26,679	11,212
Other Western	26,967	? †
Imports		? ‡

§ Comm. Br. 45.

Pet. Br. 249n (not including Crown's sales of 9,824 tons to its subsidiary Zellerbach Paper Company).

† The evidence does not permit a breakdown between sales to western jobbers and sales to western wholesale grocers, chain stores, etc.

‡ A Commission exhibit indicates average annual shipments into the West of 28,940 tons of wrapping paper (Pet. Br. 215-216). The Commission, although now claiming for the first time that the figures on its exhibit are too high, does not disparage the high order of magnitude of shipments of wrapping paper into the West revealed by its own evidence (p. 41n, *supra*). At least 13 non-western producers sold wrapping paper in the West (Pet. Br. 217-219).

(iv) Crown cannot have a "monopoly" of the "supply" of wrapping paper to western jobbers when shipments of wrapping paper into the West by southern and eastern producers apparently exceeded the *combined* wrapping paper sales of Crown and St. Helens to western jobbers (not including sales by Crown to its wholly owned subsidiary), and when substantial additional amounts of wrapping paper are available from other western producers.

3. Bag Paper

The Commission concludes, solely on the basis of western *production* statistics, that the acquisition resulted in the "supply" of western bag paper being passed from three companies (Crown, Longview and St. Helens) to two com-

panies (Crown and Longview) (Comm. Br. 47-49). The sales data in the record disprove this assertion:

Bag Paper — 1952 (tons)

Company	Production §	Western Sales #
Crown	77,485	16,153
Longview	21,782	15,500 †
St. Helens	10,834	736
St. Regis	3,270	3,270
Potlatch	9	9
Imports		?

§ Comm. Br. 47.

Pet. Br. 33, 244-245; Comm. Br. 147-148.

† Longview converts about 25% to 30% of its bag paper production. It also sold bag paper to three converters on the Atlantic Coast, but no tonnage figure appears in the evidence. (See Comm. Br. 86-87; R 1750, 1751-1754 [Wollenberg])

Consistently, Mr. Long of Graham Paper Company, St. Helens' sales agent, testified that St. Helens did not sell grocery bag paper "as a regular item" in the western states (R 2557).

In an attempt to offset the effect of this evidence in the record as to sales, the Commission argues that St. Helens converted 80% of its bag paper production and that therefore the acquisition "also" served to lessen competition in the manufacture of *bags* (Comm. Br. 48). This assertion is not only incorrect,* but completely irrelevant to the Commission's decision because the Commission deliberately

* One eastern producer alone, Hudson Paper Co., sold more bags in California than St. Helens' total sales of paper bags in all areas (compare R 2885-2886 with CX 117, p. 3).

excluded bags, a converted product, from its Census coarse paper line of commerce (Pet. Br. 27, 45-46).

4. Shipping Sack Paper

The Commission refers again only to production data; we add the evidence respecting sales which shows that St. Regis and Longview sold $2\frac{1}{2}$ times as much as Crown and St. Helens combined.

Shipping Sack Paper — 1952 (tons)

Company	Production §	Western Sales #
St. Regis	53,068	13,250
Crown	28,764	6,264
Longview	18,572	18,572
St. Helens	6,036	5,721
Imports		? †

§ Comm. Br. 49.

Pet. Br. 33, 244-245; Comm. Br. 83, 147.

† At least three non-western producers also sold shipping sack paper in the West (Pet. Br. 217-218).

Crown's position as a shipping sack paper supplier was far behind the two leaders; it was not in second place as the Commission claims (Comm. Br. 49).

While St. Helens' 1952 western sales of shipping sack paper represented 13% of sales by western mills (there is no evidence of the tonnage of sales in the West by eastern and southern mills), the Commission admits that St. Helens had planned to eliminate its sales of shipping sack paper because it found that business undesirable (Comm. Br. 83; Pet. Br. 258).

5. Envelope Paper

Envelope Paper — 1952 (tons)

Company	Production §	Western Sales #
Columbia River	7,822	?
Crown	4,140	4,072
St. Helens	3,409	3,294
Simpson Paper	287	287
Inland Empire	37	37
Imports		? †

§ Comm. Br. 50.

Pet. Br. 33, 244-245; Comm. Br. 147-148.

† At least three non-western producers also sold envelope paper in the West (Pet. Br. 217, 219).

As the above table shows, Columbia River (Salem, Oregon and Vancouver, Washington) produced more envelope paper than Crown and St. Helens combined. Faced with this dilemma, the Commission hinges its argument on the fact that Columbia River's envelope paper was made from sulphite pulp, whereas all of St. Helens' and a large part of Crown's was made from kraft (sulphate) pulp (Comm. Br. 50-51, 83-84). It thereupon asserts that the acquisition resulted in a "virtual monopoly of Crown in the West with respect to *kraft* envelope paper" (Comm. Br. 51; italics added).

The Commission, however, ignores its own finding that kraft and sulphite envelope papers are both in the same line of commerce (R 578, 589, 609-612; RX 62, pp. 38-42).

In justification of its separation of kraft and sulphite envelope papers, the Commission asserts merely that Columbia River's envelope paper was not *wholly* comparable and not *fully* competitive with kraft envelope paper (Comm. Br. 50-51). The Commission also relies on the fact that Mr. Milne of Northwest Envelope Manufacturing Company did not name Columbia River as one of his suppliers

and did not testify that Columbia River offered to sell him paper (Comm. Br. 84). Mr. Milne did *not* testify, however, that Columbia River was not an available source of supply; all he said was that he did not attempt to buy from any source other than the ones he named (R 2576).

6. Waxing Paper

Waxing Paper — 1952 (tons)

Company	Production §	Western Sales #
Crown	32,512	1,643 †
St. Helens	2,091	1,857
Potlatch	638	638
Columbia River	610	610
Longview	512	375
St. Regis	223	223
Imports		? ‡

§ Comm. Br. 50.

Pet. Br. 33, 244-245; Comm. Br. 86-87, 147-148; R 1750, 1752 [Wollenberg].

† This great disparity is due to the fact that Crown used approximately 30,000 tons of its waxing paper production in its own converting operations.

‡ West Virginia Pulp & Paper Co., a large non-western producer, sold waxing paper in the West (Pet. Br. 219).

Almost all of St. Helens' sales of waxing paper were made to one customer, and he had gone out of the waxed paper business even before the hearings in this case ended because his product was displaced by another packaging material, namely, the corrugated box (Pet. Br. 259; CX 117; R 1583, 3785-3786 [Ticoulat]; and see Comm. Br. 87).*

* The Commission accuses us of "grossly misrepresent[ing]" the testimony of this witness with respect to his sources of supply (Comm. Br. 87n). We said (Pet. Br. 259) that he "could have" purchased from Longview, relying on his testimony that Longview offered to sell him fibre cartons and, at the same time,

Crown can hardly be charged with having a monopoly of waxing paper as a result of the acquisition when in 1954, *after* the acquisition, Potlatch (which prior thereto produced hardly any waxing paper) produced 2,921 tons of waxing paper, or more than St. Helens did before the acquisition (Comm. Br. 52).

7. Gumming Paper

Gumming Paper — 1952 (tons)

Company	Production §	Western Sales #
Crown	5,615	200
St. Helens	823	695
Longview	587	587
Imports		? †

§ Comm. Br. 53.

Pet. Br. 33, 244-245; Comm. Br. 85, 147.

† International Paper and Nekoosa-Edwards, non-western producers, also sold gumming paper in the West (R 1466-1467).

The Commission says that gumming paper “quantities . . . are not very large but the competitive results are nevertheless representative of the results in all markets affected by the merger” (Comm. Br. 53). The actual result was that when St. Helens was acquired by Crown,

said it would be glad to furnish him other grades if he chose to change his source of supply (R 1417), and that “presumably” he could have purchased from Oregon Pulp (now Columbia River), relying not on his testimony as the Commission claims, but on the fact that Oregon Pulp produced waxing paper at Salem, Oregon (CX 168A [4049]; R 2124).

It is the Commission which has misrepresented the testimony of this witness. The Commission states that Longview offered to sell him “waxing paper only in connection with the sale of fibre cartons (R 1417)” (Comm. Br. 87). This statement is based on the witness’ testimony that he “presume[s]” Longview’s offer was so conditioned, which testimony was *stricken* from the record as being only the witness’ unproved assumption (R 1417).

Longview increased its gumming paper production to 832 tons (Comm. Br. 53-54) and the one known customer in the West for gumming paper added the non-western manufacturers International Paper and Nekoosa-Edwards as additional sources of supply (R 1466-1467).

The "representative" example is proof of the availability of Census coarse paper grades from other western mills and from eastern and southern mills.

8. Asphalting paper, creping paper, cup stock, twisting and spinning stock, glassine and greaseproof paper, vegetable parchment, and other converting paper.

The Commission is silent with respect to these grades of paper even though all of them are included in the Commission's "Census coarse paper" line of commerce (RX 62, pp. 38-42). Of these grades, St. Helens in 1952 produced 208 tons of glassine and greaseproof paper and 3,730 tons of "other converting" paper (CX 168A [4049]).

9. Conclusion.

The foregoing discussion demonstrates that "competition" cannot be discussed in terms of local *production* data, but must be discussed in terms of *sales*, and that the Commission's conclusions with respect to "competition" in the sale of wrapping paper to jobbers and in the sale of converting papers to converters, all of which are based solely on local western *production* data, are contradicted by the evidence as to sales in the West by both western and non-western producers.

By improperly using local western "production" as a synonym for local western "supply", a word which clearly connotes "sales" (e.g., Comm. Br. 45-46, 49, 54-55), the Commission seeks to avoid the necessity of discussing the *sales* of Census coarse paper grades in the West by either western or non-western producers. The Commission makes no mention of the substantial shipments of wrapping

paper into the West by eastern and southern mills, of the substantial shipments of paper generally (which must include large quantities of Census coarse paper converting grades) into the West, or of the 64 non-western producers who sell in the West, at least 25 of whom sell Census coarse paper grades (Pet. Br. 215-219).

Finally, we point out that in this section of its brief and elsewhere the Commission alleges, as if it were significant, that only Crown, St. Helens and Longview produced and sold a broad array of Census coarse paper grades (Comm. Br. 55, 184-185, 204). Neither the jobber nor the converter purchases a broad array of Census coarse paper grades. The only Census coarse paper grade purchased by the jobber is wrapping paper and the only Census coarse paper grade purchased by the converter is that grade of converting paper which he converts (Pet. Br. 248, 257; see also CX 117).*

C. The Commission has failed to prove that the acquisition had any anti-competitive effects on western jobbers.

The Commission claims, first, that as a result of the acquisition western jobbers became dependent on Crown for their supply of wrapping paper (Comm. Br. 57-60). We have already demonstrated that this conclusion is based solely on local production data and is contradicted

* The Commission, claiming that when a jobber talks about a "full line" of papers he "presumably" means a large variety of wrapping papers, refers to the various kinds of wrapping papers purchased by the jobber Packer-Scott in 1952 (Comm. Br. 158). The Commission fails to point out that in the same year Packer-Scott also purchased, *from St. Helens alone*, waxed paper, vegetable wrap, toweling, tagboard and 17 different kinds of bags (CX 117, pp. 128, 332). The only permissible conclusion is that when a jobber says he buys a "full line" he means a full line of *trade coarse papers*; he is not referring to the highly artificial Census classification of "Census coarse paper".

by the relevant western sales data contained in the record (pp. 47-49, *supra*).

The other alleged anti-competitive effects of the acquisition on western jobbers are based on a few remarks made by six of the jobber witnesses; one deals with a situation in 1949 and the others all relate to a period of shortage in 1955 when paper mills generally were forced to put their customers temporarily on allocation (see Pet. App. 21).

As a springboard to this discussion, the Commission asserts that Crown's ownership of a paper jobber, Zellerbach Paper Company, was "an unwholesome business condition" (Comm. Br. 60-61). This statement of the Commission, as well as others respecting the alleged effect of Crown's ownership of Zellerbach Paper, are not supported by any evidence in the record whatsoever.

1. The evidence does not support the Commission's claim that jobbers have been injured by "buying from a competitor".

The only witnesses referred to by the Commission in this connection are Messrs. Finch, Eagle and Huber (Comm. Br. 61-65).

Mr. Finch was a hostile witness whom the Hearing Examiner arbitrarily refused to let Crown cross-examine as to bias or as to the accuracy of his testimony (R 2459-2465). Although Mr. Finch testified that when a jobber buys from only one source, he tends to be "taken for granted", and that when he buys from a competitor he runs the risk of being put out of business (Comm. Br. 63), his testimony is strangely inconsistent with his refusing to buy from International Paper when it solicited his business. His explanation—that later, when all mills were putting their customers on allocation, International might have become an uncertain source of supply—is unconvincing (Pet. App. 24-25; R 2454-2455). The evidence shows fur-

ther that Publishers' Paper Co. (Oregon City) and others also offered him paper (R 2445-2446).

Mr. Eagle, of Houghtelin Paper Company, felt that his customers were confused when both he and Zellerbach Paper Co. sold paper manufactured by Crown (Comm. Br. 63-64). The confusion that Mr. Eagle claimed was not, however, caused by the acquisition; he bought \$42,867 of wrapping paper from Crown in 1952, *prior* to the acquisition (CX 36D [2279]).*

The testimony of Mr. Huber does not support the Commission's statement. He said merely that he bought from St. Helens partly "so that we wouldn't have too many eggs in one basket" (Comm. Br. 62; R 1430-1431); he said nothing about "buying from a competitor". Furthermore, the same witness testified unequivocally that at or shortly after the time of the acquisition of St. Helens, there were other sources from which he could have bought wrapping paper (R 1435, 1444-1445).**

2. The acquisition did not create a "warehouse problem" for jobbers.

The Commission accuses us of having

" . . . grossly misrepresented the record as to St. Helens' practice with respect to direct shipments (Pet. App. at 47, 61). The evidence is only one way: St. Helens accommodated its jobbers and made di-

* It should also be noted that Mr. Eagle's company, even when there was a shortage of paper, was able to buy wrapping paper from International Paper, a non-western producer, and has purchased wrapping paper from Hudson (another non-western producer) and St. Regis (R 1340, 1346-1349, 1356-1358, 1366).

** Incidentally, Crown was Mr. Huber's major supplier even before the acquisition and, when Mr. Huber was asked why he did not buy from other mills, he made a point of his "strong loyalty . . . for Coast manufacture" (R 1429-1430).

rect shipments outside a jobber's trading area." (Comm. Br. 67)

We correctly stated that Crown's policy was to make deliveries for jobbers only in the market area where the jobber maintained a warehouse and that "St. Helens had exactly the same policy (R 2859, 2861)" (Pet. App. 47). This statement accurately reflects the testimony of Mr. Landsberg, a Los Angeles jobber and a witness for the Commission, that it was St. Helens' announced policy (before its acquisition by Crown) not to deliver to his customers in areas outside Los Angeles County (R 2857, 2861).^{*} The whole "warehouse problem" section of the Commission's brief is not based on St. Helens' policy, but on two exceptions which the Commission found to St. Helens' policy.^{**}

The Commission's only other reference is to Mr. Wilson (Comm. Br. 67), who did *not* testify that St. Helens made direct deliveries for him outside his regular trading area (R 2866-2867, 2869-2870).

3. The acquisition did not create a "scheduling and delivery problem" for jobbers.

We again meet Mr. Houghtelin and Mr. Huber (Comm. Br. 69).

* The evident basis for the policy of both Crown and St. Helens is that no jobber function is being performed in sales by the jobber outside his trading area.

** International Paper apparently had no such policy, and therefore Houghtelin (one of the exceptions to the rule) was able to get International Paper to make these direct deliveries from its mill in Alabama to Houghtelin's customers in Los Angeles, Portland and Seattle, at the same price that western mills would charge (R 1346, 1348-1349, 1356-1357).

The Commission would ascribe the limit on the volume of new business International Paper would accept from Houghtelin to the alleged high cost of freight (Comm. Br. 68), whereas the testimony seems to ascribe it to International Paper's trying to get new customers "here on the Pacific Coast" (R 1356).

Mr. Houghtelin's testimony on July 14, 1955 (R 1339) was that "today", *i.e.*, during the period of shortage (Pet. App. 21), it takes longer to get a shipment than it did prior to Crown's acquisition of St. Helens in 1953 (Comm. Br. 69).

Mr. Huber's testimony was even clearer:

"A. Well, recently deliveries have slowed up.

"Q. Do you know why? A. Well, we have a shortage of paper. The mills can't turn it out quite as fast and expediently as they could awhile back." (R 1430)

The Commission next discusses the minimum quantities which Crown requires before it will produce a special grade paper and the fact that St. Helens had smaller minimum requirements (Comm. Br. 70-72). This is what the president of St. Helens referred to as the "cat and dog business" which St. Helens had to eliminate if it were to stay in business (R 2136-2138, 2182-2183, 2296 [Oberdorfer], 2555-2556 [Long]; RX 24[4695]).*

4. The acquisition did not create "allotment problems" for jobbers.

The Commission's whole section on allotment (Comm. Br. 73-77) is based on a misrepresentation of the record.

As a result of an increasing general shortage of paper, accentuated by the fact that certain customers were beginning to order in excessive amounts beyond their normal requirements, Crown put its customers on allocation effective June 1, 1955 (R 3779-3780 [Ticoulat]). This started as a "grade allocation" because that is the way in which Crown's IBM records are kept; shortly thereafter custo-

* For example, the minimum quantity which Crown would produce of a special width of paper was 1 ton while St. Helens' minimum was 1/4 ton; one ton of this paper costs \$200 (R 2900-2901; cf. Comm. Br. 82n).

mers were permitted to exchange allocations as between grades and Mr. Ticoulat, Crown's sales vice-president, testified that he knew of no instance where such a request was denied (R 3780).

Despite this testimony, Commission counsel submitted a proposed finding to the Hearing Examiner (R 247) that the change from a grade allocation to an over-all allocation was not made until after the "allotment program had been described in the record in this case", which was July 14, 1955 (R 1339).

The Hearing Examiner refused to make such a finding and found, instead, exactly in accordance with Mr. Ticoulat's testimony, that the change was made "within a few weeks" after the allotment program was started (R 582), which was on June 1, 1955 (R 3780 [Ticoulat]). The Hearing Examiner thus found that the change in allotment was prior to any testimony on the subject in this case.

Completely ignoring this finding, which it adopted (R 605), the Commission now reasserts what its counsel proposed to the Hearing Examiner, to wit, that the change "occurred only after the practice was exposed by the testimony of the jobbers in this case" (Comm. Br. 76-77).

Apart from this flat misstatement of the record, the Commission's only argument respecting the allotment situation is that, "if" Crown had increased its wrapping paper production during the period of allotment, the independent jobbers would not benefit (Comm. Br. 73). A more reasonable conclusion is that, if production had increased, allocation would have come to an end (see R 3781 [Ticoulat]).

5. It is not Crown's policy to refuse to sell to jobbers.

Mr. Caskey, a jobber, testified that in 1949 (over four years before the acquisition of St. Helens) Crown refused to sell him paper (R 1447-1450). The Commission quarrels

with our statement that "this episode obviously reflects a shortage of paper in 1949" (Comm. Br. 79n).

Mr. Caskey started in business the first week of February 1949 and the episode he refers to must have preceded his entry into business (see R 1448-1450). Crown did not go off World War II allocations until January 1, 1949 (R 3781 [Ticoulat]).*

The Commission was unable to find any other instance of a refusal to sell by Crown, either before or after the acquisition of St. Helens, and the evidence is clear that such is not the policy of Crown (Pet. App. 47; R 1657-1658 [Ticoulat]).

6. Conclusion.

The foregoing represents the Commission's total list of claimed anti-competitive consequences to western jobbers arising out of Crown's acquisition of St. Helens. Every assertion, however, is either erroneous or misleading.

D. The Commission has failed to prove that the acquisition had any anti-competitive effects on western converters.

The Commission claims that, as a result of the acquisition, western competitors were "required to look to Crown principally for their requirements" even though Crown was "one of their main competitors" (Comm. Br. 88-89). This assertion is wholly without merit.

(i) The Commission refers only to bag paper, shipping sack paper, waxing paper, envelope paper and gumming paper (Comm. Br. 81-88). The Commission claims no adverse effect on converters of creping paper, asphaltting paper, cup stock, glassine converting papers and many of

* Mr. Oberdorfer, St. Helens' former president, was unclear whether the change from a sellers' to a buyers' market occurred at the end of 1948 or the beginning of 1949 (R 2295).

the other converting papers included in the Census coarse paper classification; these converting papers in the aggregate represented 22% of the Census coarse paper grades purchased by converters (*i.e.*, all Census coarse paper grades other than wrapping paper) (see RX 62, pp. 10-11).

Of the remaining 78% of the converting grades, bag paper represented 33% and, as we have seen above, St. Helens was not in the bag paper business (see RX 62, pp. 10-11; pp. 49-51, *supra*).

28% of the Census coarse paper grades purchased by converters consists of shipping sack paper, a grade of paper which St. Helens had planned wholly to discontinue (see RX 62, pp. 10-11; p. 51, *supra*).

Thus, the acquisition could not possibly have had any substantial effect on competition with respect to Census coarse paper converting grades representing 83% of the total of the Census coarse paper grades purchased by converters.

Nor did the acquisition adversely affect converters purchasing the remaining 17% of the Census coarse paper converting grades, namely, waxing paper, envelope paper and gumming paper (RX 62, pp. 10-11).

St. Helens' sales of waxing paper were made principally to one customer, Salinas Valley, who had gone out of the waxed paper business before the hearings in this case ended (p. 53, *supra*); Columbia River produced more envelope paper than Crown and St. Helens combined (p. 52, *supra*); and the one western customer for gumming paper, Adhesive Products, added two non-western suppliers after the acquisition (pp. 54-55, *supra*).

(ii) Of the converter customers of St. Helens who were selected as Commission witnesses, only two competed with Crown in the sale of their converted products (R 1463,

1485).^{*} Los Angeles Paper Bag's long-standing position as a customer-competitor of Crown was not changed by the acquisition, nor was the availability to it of St. Regis as another source of supply, and after the acquisition, Los Angeles Paper Bag had Weyerhaeuser and Western Kraft as additional sources of supply (R 1471-1472). Crown's other converter-competitor, Adhesive Products, is supplied by Longview and by the non-western suppliers International and Nekoosa-Edwards, as well as by Crown (R 1460-1461, 1466-1467).

(iii) Contrary to the Commission's assertion in its brief, the evidence is that western converters of the Census coarse paper grades are not dependent on Crown as a result of the acquisition (Pet. Br. 256-261).

This was recognized by the more cautious language used by the Commission in its opinion, which was merely:

"It likewise *appears* that *many* [*i.e.*, some] converters which formerly could look to St. Helens for purchases of the relevant papers must now depend upon Crown as *a* [*i.e.*, one of a number] primary source of supply" (R 616-617; italics added)

E. The Commission fails to consider the dynamic nature of the paper industry.

Despite the undisputed proposition that all relevant economic factors must be examined in a Section 7 case to ascertain the probable economic consequences (Pet. Br. 35-39, 263-264), the Commission completely ignores the paper industry's phenomenal growth, particularly in the West, the low level of concentration in the paper industry in the West, the great opportunity there for new entry and fur-

* Crown also competed with Salinas Valley in the sale of waxed crate liners before crate liners became a victim of progress (R 1405 and 1583, 3785-3786 [Ticoulat]).

ther growth, the vast supply in the West, in the form of sawmill and plywood mill residuals (chips) and forest residuals, of the basic paper-making raw material, pulpwood, and the resulting diminution of Crown's position in the West (Pet. Br. 58-69, 264-273).*

The Commission does not argue with this evidence because it cannot be disputed; this evidence proves that there is no reasonable probability that the acquisition will substantially lessen competition or tend to create a monopoly, even in the extremely narrow and unrealistic western Census coarse paper "market" found by the Commission.

F. The Commission has neither rebutted nor taken into consideration the other relevant economic evidence.

The only economic factors which the Commission considered relevant to its discussion of competition (Point I of its brief) were statistics as to local western production of Census coarse paper grades and the testimony of a few jobbers and converters on the Pacific Coast (Comm. Br. 39-43, 175). The other relevant economic factors were either ignored by the Commission or glossed over in Point IV of its brief.

1. St. Helens planned largely to abandon the production and sale of the Census coarse paper grades.

The Commission is forced to admit that St. Helens wanted

* The Commission thrusts aside our demonstration of Crown's declining position in the West, asserting, without support or reference to evidence, that it does not present Crown's true standing with respect to the Census coarse paper grades (Comm. Br. 56n). The Commission does not even attempt to answer our showing that Crown's decline in the West generally is consistent only with a proportionate decline with respect to the Census coarse paper grades (Pet. Br. 68-69).

to swing its production out of the unbleached papers—which formerly accounted for two-thirds of its entire output—and into the heavier weight bleached grades, practically all of which are outside the Commission's Census coarse paper line of commerce (Comm. Br. 176-179; see Pet. Br. 108-114). The Commission claims only that St. Helens planned to continue selling wrapping paper to its jobber customers (Comm. Br. 178, 179).

Even if the Commission's claim were correct—which it is not*—the Commission's decision would still have to be set aside because the sale of wrapping paper to jobbers is not the "market" found by the Commission.**

2. The paper industry adjusts flexibly to meet changing market demands.

A paper mill can and will, because of the flexibility of its equipment, change its pattern of production with changes in the relative profitability of producing different grades of paper (Pet. Br. 51-55, 160-169, 273-275; pp. 24-29, *supra*).

Therefore, the overhanging capacity of Crown's western competitors to produce Census coarse paper grades (*e.g.*, Pet. Br. 167n) is an absolute bar to artificial shortages or artificial prices and a factor which must be considered in determining whether the effect of Crown's acquisition of

* The president of St. Helens thought that the mill was losing money on wrapping paper and, in addition, wanted to get away from jobber orders for small quantities of special grades of paper which he referred to as "cat and dog" business (Pet. Br. 108-109, 114, 276n; R 1844-1845 [Hunt], 2136-2138, 2182-2183, 2296 [Oberdorfer], 2555-2556 [Long]; RX 24 [4695]).

** The Court should note that wrapping paper, to which the Commission devotes most of its attention, represents only about 20% of the Census coarse paper grades (RX 62, pp. 10-11). Furthermore, jobbers are only one of several types of purchasers of wrapping paper (pp. 47-48, *supra*). Thus, the sale of wrapping paper to jobbers represents only a small fraction of the sales of all the Census coarse paper grades.

St. Helens may, "in the long run", be substantially to lessen competition.

3. The eight new entrants into the West cannot be ignored.

In our main brief, we demonstrated that eight new competitors have made their appearance in the paper industry in the West since 1949 and that six of them have made their appearance since Crown's acquisition of St. Helens in 1953 (Pet. Br. 266-272).

The Commission claims, however, that four of these companies (St. Regis, Weyerhaeuser, Potlatch and Western Kraft) produced and sold only limited or small quantities of the Census coarse paper grades, that one of them (Scott) does not produce any Census coarse paper grades, that the paper making facilities of all of them are "devoted" primarily to the production of grades of paper other than Census coarse paper grades, and that therefore they are not competitors of Crown with respect to Census coarse paper grades and constitute no threat to Crown's alleged position in the western "Census coarse paper market" (Comm. Br. 199-202).

The Commission can advance this argument only by ignoring its own findings and the evidence of production flexibility (pp. 24-29, *supra*). These new entrants, like the established companies, will respond to the law of supply and demand and produce and sell those products which have the highest demand and profitability, whether they be Census coarse paper grades or other grades of trade coarse paper (Pet. Br. 166-169, 270-271; RX 92A, pp. 36-37, 471-472).

As to the sixth new competitor, R-W Paper Company, the Commission admits that it will produce *only* Census coarse paper grades, but argues irrelevantly that it will not produce "a broad line" of Census coarse paper grades (Comm. Br. 202).

Georgia-Pacific and International Paper, the last two new entrants, are ignored by the Commission because they had not yet built their mills when the record was closed and because the record did not indicate what grades of paper they were going to produce in the West (Comm. Br. 202-203). The Commission misconceives the Section 7 standard of illegality: Section 7 is concerned with what "may be", *i.e.*, with the future (Pet. Br. 38-39) and any lessening of competition is temporary and therefore insignificant if new, vigorous and substantial competitors are on the threshold of the market.

That Georgia-Pacific and International had not yet determined what grades of paper they would sell only proves the flexibility of the paper industry. For example, Georgia-Pacific stated that it will let the product mix of its new "flexible" mill be determined by "the market situation at the time the mill goes into production" (RX 96 [5120]).

4. St. Helens was an ineffective competitor and its prospect of rehabilitation was remote.

In an unsuccessful attempt to rebut the overwhelming evidence of St. Helens' ineffectiveness as a competitor (Pet. Br. 81-114), the Commission points to St. Helens' past financial statistics, argues, without reference to substantial evidence, that St. Helens' deplorable situation was a temporary one limited to the period of St. Helens' rebuilding program, and claims, contrary to the clear evidence, that while St. Helens needed additional financing to complete its rebuilding program, the money was available (Comm. Br. 205-227).*

* The Commission also asserts, contrary to the clear evidence (Pet. Br. 98-100; Pet. App. 66-68), that St. Helens' rebuilding program was sound and well-conceived. The only argument it makes in support of this assertion, however, is that it must have been sound and well-conceived because Crown carried it for-

(i) *St. Helens' past financial statistics are misleading:*

The past financial statistics for St. Helens cannot overcome the clear proof of St. Helens' ineffectiveness as a competitor in 1952 and 1953 and of its inability to survive in a competitive market (Pet. Br. 81 *et seq.*).

The clearest demonstration of how misleading bare financial statistics can be is the fact that the Commission's so-called "acid test ratio" (its term for the ratio of current assets less inventory, to current liabilities) shows that St. Helens was in the "soundest" financial condition in its history at December 31, 1952 (Comm. Br. 221). The facts, however, demonstrate how precarious St. Helens' financial condition actually was at that time.

St. Helens had just borrowed \$4,000,000; the cash, when received, was a current asset, whereas the debt was treated as a long-term and not a current liability (CX 51 [2841]). Yet, St. Helens' current assets (less inventories) at the end of 1952 were *less* than at the beginning of the year, and its resources were so depleted that it could not meet its commitments to pay for the rebuilding of its No. 1 machine (which was the heart of its whole rehabilitation program); St. Helens was forced to suspend the rebuilding contract and, as a result, faced a total loss of the approximately \$500,000 it had already paid for work done by the machine manufacturer (CX 51 [2841-2842]; Pet. Br. 99-100). Thus, St. Helens' current asset position at December 31, 1952 was completely inadequate to meet its contract obligations, despite its favorable "acid test ratio".

Nor can the Commission's tables of past financial statistics explain away the fact that St. Helens' operating

ward to completion (Comm. Br. 207, 209-210). Crown did complete the items in St. Helens' program which St. Helens had started but left unfinished, but Crown had to spend over \$2,000,000 on improvements which should have been included in St. Helens' program, but were not (R 564-565, 2965-2967 [Hunt], 3861-3863 [Carpenter]; RX 44A-B [4750-4751]).

profits gradually declined during 1952 until it sustained a loss from operations in the last quarter (RX 23E-H [4685-4691]).*

(ii) *St. Helens' deplorable situation was not caused by its rebuilding program*: The only evidence referred to by the Commission to support its claim that St. Helens was merely "weathering the temporary difficulties caused by its construction program" is an equivocally optimistic letter to stockholders from St. Helens' president contained in St. Helens' 1952 Annual Report (Comm. Br. 214, 222-223).**

However, in October, 1952, St. Helens' president stated in a *private* letter that only "*Some of our troubles will be remedied as the modernization program progresses . . .*" (RX 21 [4675]; italics added). The evidence also proves that the disproportionate quantities of unbleached paper which were produced by St. Helens in 1952 were only "partly" attributable to the rebuilding program (R 2318; see, also, R 2263 [Oberdorfer]; cf. the Commission's misstatement of this testimony [Comm. Br. 207]); and that even before the rehabilitation program began, St. Helens could not produce "continuously" a No. 2 Yewbo kraft which met government specifications (R 2263 [Oberdor-

* The Commission refers to St. Helens' \$101,340 of profit in the first three months of 1953 (Comm. Br. 214), which would appear to be due at least in part to the fact that in the months preceding the acquisition in June, 1953 Crown started to purchase paper from St. Helens (R 1721 [Ticoulat]). Even at an earnings rate based on this \$101,340 of profits, St. Helens would have had little, if any, margin to continue its rehabilitation program after paying interest and amortization on the \$4,000,000 it borrowed in 1952; no interest or amortization was payable in the first quarter of 1953 (Pet. Br. 84; CX 4, pp. 41, 59 [1755, 1773]; RX 49, p. 11 [4793]; RX 50, p. 9 [4803]).

** "Increased earnings resulting from the large capital expenditures we have made *should* begin to be realized in 1953" (Comm. Br. 222; italics added).

fer]). In fact, generally, from 1947 through 1953, the quality of paper off the No. 1 machine was "not very good" and "there was room for considerable improvement" (R 3608-3609 [Goodwillie*]).

Consistently, Dr. Carpenter, an independent paper consultant retained by Olin Industries to study the St. Helens mill when Olin was considering the acquisition of St. Helens (Pet. Br. 83), testified:

"In my opinion the physical condition of the mill was what I would call poor. Their housekeeping was bad. There was dirt and litter inside and outside the mill. The condition of the equipment by and large, the old equipment by and large, was not first-class. It lacked in maintenance.

"In addition, in my opinion they hadn't kept the mill sufficiently modern to be competitive. It was still operating and was operating at a level you might consider—well, it's all right, but seeing—I am particularly, if I may digress here, conversant with the paper industry in the south which is a relatively new industry. We have many new mills and even if the mill is 20 years old, it looks new. It is kept modernized. They keep pace with the newer develop-

* At one point in its brief, the Commission quotes only a part of Mr. Goodwillie's testimony to give the incorrect impression that Mr. Goodwillie had no quarrel with the maintenance conditions of St. Helens' machines (Comm. Br. 209). The Commission omitted the testimony of Mr. Goodwillie that, in 1953, St. Helens was still operating its No. 1 machine with its original but out-of-date rope drive, whereas other mills had long since replaced the rope drive with a more modern type of mechanical drive; that the old fashioned natural draft ventilating hood on the No. 1 machine was penalizing production by about 5% to 10%; and that the reel and winder parts of the No. 1 machine were worn out and needed replacement and were causing spoilage of paper and loss of production (R 3603-3607, 3626).

ments in the industry, and a piece of equipment may only be ten years old but if there is something more efficient, it will be replaced. And this mill wasn't the case—old, obsolescent equipment in there, still operating, with the penalty in operating costs, high maintenance costs, and even at that not too well maintained, and frankly, I was quite surprised that a mill of this size and with a past record, a good past record, was in that deplorable—to me it was deplorable, sorry state, as when I saw it in January 1953.” (R 3864-3865)

There is nothing in this testimony to suggest that St. Helens’ “sorry state” was due to the rebuilding program.*

(iii) *The additional financing St. Helens needed was not available*: The Commission accuses us of basing this contention on “a misleading selection of bits of evidence” (Comm. Br. 210).

First, it claims that St. Helens needed only \$2 million more and not, as we state, a *minimum* of \$2,425,000 (Comm. Br. 210). The Commission’s \$2 million figure is based on a cost estimate of \$8,875,000; however, engineers retained at the request of St. Helens’ creditors found, and St. Helens’ president agreed, that the \$8,875,000 estimate was

* The Commission disputes the conclusion that the small value of the St. Helens’ mill is demonstrated by the fact that the total purchase price of all of St. Helens’ assets was approximately \$9,557,000, which included timberlands with an \$8 million retail value (Comm. Br. 226-227). It is no answer for the Commission to talk about the comparative “book value figures” for Crown’s and St. Helens’ timber holdings (Comm. Br. 227). The \$1,346,236 book value of St. Helens’ timberlands substantially understated their actual value (CX 4, pp. 9, 57 [1723, 1771]). The \$8 million figure was *found* by the Commission as a fact (R 558).

too low and that \$9.3 million would be required (Pet. Br. 84).*

The Commission then claims that the additional financing was available, referring to a paragraph from the minutes of a St. Helens Board of Directors meeting (Comm. Br. 210-211). This very paragraph, however, squarely contradicts the Commission's conclusion; it states that

“ . . . neither [of the lenders] would go for an additional loan.” (Pet. Br. 101)**

Further proof of the unavailability of the additional financing which St. Helens needed is the fact that on March 17, 1953, two months after the Board meeting referred to above, St. Helens' president told the stockholders that

“As of December 31, 1952, funds are available to complete all phases of the program *currently underway*.” (CX 51, p. 5 [2836]; italics added)

No representation was made that either funds or financing was available for the whole \$9.3 million of St. Helens' program; on the contrary, the same report to stockholders stated that the contract to rebuild the No. 1 machine had been suspended

“ . . . since it appeared additional financing would be necessary in order to complete this part of the program.” (CX 51, p. 5 [2836])

* Dr. Carpenter, another independent expert, found that, over and above the \$9.3 million, \$4 million would be needed for several items not included in St. Helens' program, but which were necessary for even minimum operation of the mill (Pet. Br. 103-104; R 3861-3863).

** Although we and the Commission both rely on this same paragraph, only we set it forth *in haec verba* (Pet. Br. 101; Pet. App. 5-6, 69). The Commission paraphrases it, *and paraphrases it incorrectly* (compare Comm. Br. 211 with RX 12Z-103 [4601]).

Unless its whole program could be completed, St. Helens' hopes for survival were slim (Pet. Br. 100; Pet. App. 69) and its "prospect for rehabilitation . . . remote" (*International Shoe Co. v. FTC*, 280 U. S. 291, 302 (1930)).

(iv) *The Commission ignores the other evidence of St. Helens' ineffectiveness as a competitor*: St. Helens' own president said that the Company's management would have to be corrected "before we will be on a truly competitive basis" (RX 21 [4675]). Yet, the Commission argues that St. Helens' management was competent, relying solely on tables of past statistics (Comm. Br. 223-224).

The Commission also ignores the fact that St. Helens' maintenance control was practically nonexistent, that quality control was completely lacking, that St. Helens had no cost accounting system or cost controls on a grade by grade basis, that it had only eight salesmen in the West who spent most of their time just taking orders from old customers, that St. Helens' mill was forever making short runs of paper which St. Helens' president referred to as "cat and dog" business (*e.g.*, \$50 orders for ¼ ton of a special width of paper; R 2900-2901) and that St. Helens' "policy" was to be a price "follower" (Pet. Br. 90, 111-113).

It was therefore not surprising that the Hearing Examiner *refused* to adopt the requested finding of Commission counsel that St. Helens was an "effective" competitor (Pet. App. 14).

The Commission labels as a "ridiculous assertion" our statement that the Hearing Examiner refused to find that St. Helens was an "effective" competitor (Comm. Br. 104n). The following comparison of the finding proposed by Commission counsel with the Hearing Examiner's finding completely supports this "ridiculous assertion":

Commission Counsel's
Proposed Finding

"228. St. Helens was engaged in *effective* competition directly and primarily in the 11 western states. . . ." (R 214; italics added).

Hearing Examiner's
Finding

"74. St. Helens was engaged in competition directly and primarily in the eleven Western States. . . ." (R 580).

In a further effort to make St. Helens an "effective" competitor, the Commission claims that the Hearing Examiner found that St. Helens was "able to continue as a *successful* competitor" (Comm. Br. 10; italics added). There is no citation for this claim and it is not the fact; the Hearing Examiner made no such finding.

The Commission repeatedly asserts that Crown's sales vice-president, Mr. Ticoulat, characterized St. Helens as "a very aggressive competitor (R 1568)" (*e.g.*, Comm. Br. 11, 104, 168), misstating Mr. Ticoulat's testimony:

"Q. Well, isn't it a fact that *you* [Crown] met [St. Helens] in the 11 western states rather than the entire area [west of the Mississippi]?"

"A. Very aggressively in the 11 western states." (R 1568; italics added)

The evidence is all one way: St. Helens was not an effective competitor and its acquisition by Crown could not have resulted in *substantially* lessening competition, no matter how narrowly the relevant market is defined.*

* In answer to our showing that St. Helens had a rapidly declining position as a western supplier because of the absolute decline at St. Helens and the rapid expansion by its competitors (Pet. Br. 96-97), the Commission merely recites that St. Helens' *production* of Census coarse paper grades, as a percentage of total western production of such grades, declined only from 13.9% in 1947 to 12.1% in 1952 (a 14% decline) (Comm. Br.

G. Conclusion — The evidence proves that the acquisition will not have the adverse competitive consequences prohibited by Section 7.

The Commission's brief is very explicit as to the factors the Commission considers relevant to the question whether the effect of the acquisition may be substantially to lessen competition or to tend to create a monopoly in the western Census coarse paper "market". These factors are (1) the local production in the West of Census coarse paper grades, (2) the sale of Census coarse paper grades to jobbers and (3) the sale of Census coarse paper grades to converters (Comm. Br. 42, 175).

(i) Local production, however, cannot be equated with sales; the sales statistics tell a far different story and demonstrate that the Commission's conclusions, based on production alone, are incorrect and misleading (pp. 45-56, *supra*).

The Commission is under the fatal disadvantage that none of its evidence with respect to *sales* was addressed to its "Census coarse paper market". This is the natural consequence of waiting until after the evidence is closed before "identifying" the line of commerce to which the evidence should have been addressed (see Comm. Br. 236-237).

Thus, we find that the Commission's survey was addressed to a market far different from the "Census coarse paper market" which the Commission "identified" after the record was closed. Table V, appearing at page 125 of our main brief, demonstrates that the survey covered only some of the Census coarse paper grades and intermingled many items which the Census does not classify as "coarse

216n). The Commission ignores the further vital fact that in 1952 St. Helens was unable to sell much of the paper it produced (Pet. Br. 92-96), and therefore its position as a *supplier* declined much more sharply than 14% between 1947 and 1952.

paper". Therefore, even if the survey had been competently conducted and produced reliable evidence, the results would have been useless because they would have yielded no statistics on the purchase of Census coarse paper grades.

The Commission's only attempt at evidence of inter-regional shipments was the I. C. C. data which it introduced (CX 86-90 [3083 *et seq.*]). Again, however, the classifications of the I. C. C. do not follow the Census classification system and therefore the I. C. C. data do not yield any overall statistics for Census coarse paper grades or statistics for any individual Census coarse paper grade other than wrapping paper (Pet. Br. 215-216).

There can be no clearer demonstration of the impropriety of not "identifying" the relevant line of commerce until after the record is closed. The Commission's order in this case depends upon the ignorance which results from the lack of evidence addressed to the line of commerce which the Commission later "identified", rather than the intelligence which could have been brought into the record had the line of commerce been alleged and proved at the outset of the hearings.

(ii) The Commission's consideration of jobbers is directed to only a fragment of its "market"; it ignores the other classes of purchasers who buy the one Census coarse paper grade (wrapping paper) purchased by jobbers and it ignores even jobbers who are located in eight of the 11 western states. Even for this market fragment, the Commission was unable to prove its assertion of competitive harm and dependence on Crown as a source of supply (pp. 47-49, 56-62, *supra*).

(iii) The Commission is unable to cite any evidence to support its claim that western converters are dependent on Crown as a source of supply (pp. 49-55, 62-64, *supra*). Converting papers represent about 80% of the Census coarse paper grades (RX 62, pp. 10-11).

(iv) The Commission's competition argument is completely divorced from the evidence as to the nature and extent of competition (pp. 64-75, *supra*).

The Commission's brief demonstrates its inability to support, by substantial evidence on the whole record, its conclusion that the effect of the acquisition of St. Helens may be substantially to lessen competition or to tend to create a monopoly in the sale of Census coarse paper grades in the 11 western states. The order of the Commission must, therefore, be set aside.

POINT IV

The Commission has not met our proof that it committed substantial, prejudicial and reversible errors, and deprived Crown of its constitutional right to a fair hearing according to due process of law.

A. The Commission's order must be set aside because it received in evidence and refused to strike from the record its inadmissible survey report and the testimony of its economist based entirely on the inadmissible survey report.

The Commission does not deny that it conducted a secret, *ex parte*, mail-order survey; that it directed the Hearing Examiner to receive the survey report in evidence in violation of Section 7(b) of the Administrative Procedure Act*; that the survey report was received in evidence in

* Section 7(b) of the Administrative Procedure Act (60 Stat. 241, 5 U. S. C. § 1006(b)), provides in relevant part:

"Officers presiding at hearings shall have authority . . . to . . . (3) rule upon offers of proof and receive relevant evidence. . . ."

See, also, *Attorney General's Manual on the Administrative Procedure Act* (1947), p. 74 (Pet. Br. 144-145).

violation of Section 7(c) of the Administrative Procedure Act and Section 3.14 of its own rules of Practice*; that it permitted its economist to testify at length as to the conclusions it should draw from the inadmissible survey; and that it refused to strike the survey report and the survey-based testimony of its economist from evidence, despite the fact that the survey was proved to be biased, inaccurate and misleading (Pet. Br. 122 *et seq.*).**

The Commission claims merely that the “erroneous admission” of the survey material “is not reversible error” because, it asserts, the receipt of the evidence was not prejudicial to Crown (Comm. Br. 229-236). The Commission’s argument is that both it and the Hearing Examiner *stated* in their opinions that they did not rely on the inadmissible

* Section 7(c) of the Administrative Procedure Act (60 Stat. 241, 5 U. S. C. § 1006(c)) provides that:

“ . . . no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence.”

Accordingly, the Commission’s Rules of Practice provide:

“§3.14 *Evidence*—

* * *

“(b) *Admissibility*. Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable, and unduly repetitious evidence shall be excluded.” (16 C. F. R. §3.14)

** The authorities relied upon by the Commission to excuse its failure to strike the survey evidence, Section 7(c) of the Administrative Procedure Act and the Attorney General’s comments thereon (Comm. Br. 229n), prove the Commission’s error. Both authorities state that “every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence” and that “no sanction shall be imposed . . . or order be issued except upon consideration of the whole record . . . as supported by and in accordance with the reliable, probative, and substantial evidence”.

survey report. *Ergo*, the Commission argues, neither it nor the Hearing Examiner was *in fact* influenced in its or his decision by the incompetent survey report. The Commission further argues that, even though neither it nor the Hearing Examiner denied having relied on the survey-based testimony of the Commission economist, nevertheless they did not, “perforce”, rely on that testimony either (Comm. Br. 229-230, 235).

However, we have *proved* that an indispensable finding of the Commission, to wit, that sales in the 11 western states by non-western producers were insignificant, could not have been made except in reliance on the inadmissible survey evidence (Pet. Br. 146-148; Pet. App. 19-36, 39-40, 55).*

Furthermore, the incompetent survey report was used to defeat Crown’s motion to dismiss at the end of the Commission’s case (Pet. Br. 145-146)** and the Hearing Examiner and the Commission reached their decisions in the context of the endless and ever intertwined repetition throughout the hearings and throughout the briefs, proposed findings and arguments of Commission counsel, of the erroneous “facts” put in evidence through the incorrect and misleading survey report and the testimony of the

* The Commission, in defense, merely asserts that there is “a great deal of evidence” and a “vast amount of evidence” to support the finding (Comm. Br. 231-232). We have already demonstrated that this is not so (pp. 39-41, *supra*), and the Commission does not even attempt to answer the extensive and detailed demonstration set forth in our Specification of Errors (Pet. App. 19-36).

** To meet this point, the Commission refers only to the irrelevant fact that its direct case consisted of 63 witnesses and over 125 exhibits (Comm. Br. 234-235). The survey was the Commission’s *only* attempt at proving market shares and market structure.

Commission's economist based thereon (Pet. Br. 146-147; Pet. App. 127).*

The Commission's confession of error, coupled with its wholly ineffective attempt at avoidance, demonstrates that our survey point is not "an obvious ruse to lead the Court astray" (Comm. Br. 235) but proves that the Commission's conduct with respect to the survey evidence deprived Crown of a fair trial and constituted substantial, prejudicial and reversible error.**

B. The Commission's admission that it refused to define what it claimed to be the relevant line of commerce until after the record was closed requires that its order be set aside.

The Commission makes the astonishing argument that it was "perfectly correct" in refusing to define the line of commerce either before or during the course of trial; "the actual determination of the line of commerce", it says, "should be made by the Commission when all evidence was in" (Comm. Br. 236-237).

The Commission relies on its distorted legal theory that the effects of an acquisition must be considered first and

* The Commission does not even attempt to answer this point.

** In an attempt to meet our contention that Crown was denied its right to cross-examine Commission witnesses on their survey questionnaires or to impeach them by confronting them with their questionnaires (Pet. Br. 134), the Commission claims that the Hearing Examiner "ruled" that Crown "must make these witnesses its own . . . (R 135)" (Comm. Br. 234). The Hearing Examiner never made any such ruling (Pet. App. 104-108 sets forth all his rulings on this matter), and at the page in the record cited by the Commission (R 135), which is the Hearing Examiner's opinion denying Crown's motion to strike the survey evidence, the Hearing Examiner for the first time argued—*after the record was closed*—that his "ruling [*preventing Crown's cross-examination of these witnesses*] did not preclude counsel for [Crown] from making such witnesses his own. . . .".

that only after these effects have been examined is it appropriate to "select" [Note: not prove] the relevant line of commerce (Comm. Br. 236-237). We have already exposed this upside-down approach to Section 7 as merely a poor excuse for the Commission's failure to prove the relevant market (pp. 4-6, *supra*); regardless of fanciful legal theories, a defendant is always entitled to know what he is being charged with (*Morgan v. United States*, 304 U. S. 1, 18 (1938), Pet. Br. 176).

How can anyone investigate the effects on competition in a "line of commerce" *before* knowing the identity of that line of commerce? (See *Englander Motors, Inc. v. Ford Motor Co.*, CCH Trade Reg. Rep. ¶69,366 (6th Cir. May 26, 1959))

The Commission incorrectly asserts that the complaint "adequately framed the issues as to the line of commerce involved" and "sufficiently apprised [Crown] of the product area involved" (Comm. Br. 236-237).

The market pleaded in the complaint was "kraft" paper and paper bags. This would include some, but not all, of the Census coarse paper grades*; it would also include many papers classified in most of the other Census categories of trade coarse paper, as well as bags (converted paper products which are not included in "Census coarse paper") (Pet. Br. 21, 175).

* For example, "kraft" paper is paper made from sulphate pulp only; it does not include paper made from sulphite pulp (R 568; RX 92A, 17-25). Yet, both sulphate (kraft) and sulphite papers are included in "Census coarse paper" (RX 62, pp. 38-42).

C. The Commission's order must be set aside because it neither amended nor dismissed its complaint when all of the complaint's essential allegations were disproved, but rested its decision on a supposed violation different from that alleged in the complaint, which supposed violation Crown had no opportunity to meet.

The gist of the Commission's complaint was (i) that St. Helens, with an alleged 20% share of the market for kraft (sulphate) paper and paper bags in the Pacific Coast states, was acquired by Crown, which had an alleged 50% share of that market, and (ii) that therefore the acquisition may substantially lessen competition or tend to create a monopoly in that market (Pet. Br. 13-15).

Because the share of the market allegations of the complaint were disproved, and Crown's share of the complaint's market was shown to be declining, the evidence required the Commission to dismiss its complaint for failure of proof (Pet. Br. 15-20).

However, instead of dismissing its complaint, the Commission merely abandoned the market there alleged and, after the evidence was closed, without notice to or opportunity for Crown to put in rebutting evidence, determined upon "Census coarse paper" as the line of commerce, a very different and very much smaller grouping than that alleged in its complaint, and found the relevant section of the country to be the 11 western states, rather than the three Pacific Coast states (Pet. Br. 20-21).

Challenged with these facts and faced with a lack of substantial evidence to support its complaint, the Commission remains mute. It would be hard to find a clearer admission of reversible error and the denial of a fair trial, or a greater abuse of the administrative process. (See, *FTC v. Gratz*, 253 U. S. 421, 427 (1920), *Western Sugar Refinery Co. v. FTC*, 275 Fed. 725, 732 (9th Cir. 1921), *Gimbel Bros. v. FTC*, 116 F. 2d 578, 579 (2d Cir. 1941))

POINT V

The Commission has not rebutted our demonstration that the findings and conclusions upon which its order is based are indefinite and uncertain and do not comply with the requisite statutory requirements.

The Commission has no quarrel with our statement of the law. Section 11 of the Clayton Act, as amended, and Section 8(b) of the Administrative Procedure Act, require the Commission to make adequate exposition of the grounds for its action and to be clear and complete.* It must, in addition to stating the reasons or basis for its decision, make findings as to all material issues and, in the event it rejects findings of its Hearing Examiner, it must make new findings with respect to each such finding which it does not adopt.

The Commission argues only that the findings of the Hearing Examiner are definite, certain and explicit and that, on review, it adopted all of the Hearing Examiner's findings, except those which purported to support his conclusion respecting the relevant line of commerce (Comm. Br. 237-238).

The Commission does *not* claim, however, that it made any new findings in place of the line of commerce findings

* Section 11 of the Clayton Act provides:

"If upon . . . hearing the Commission . . . shall be of the opinion that any of the provisions of said sections [including Section 7] have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts"

and Section 8(b) of the Administrative Procedure Act (60 Stat. 242, 5 U. S. C. § 1007(b)) provides:

"All decisions . . . shall . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record"

which it rejected. This admitted failure of the Commission to comply with the statutory requirements that it make findings as to the line of commerce renders its decision indefinite and uncertain and requires that its order be set aside.

Equally unsatisfactory is the Commission's answer to our demonstration (i) that it is indefinite and uncertain whether the Hearing Examiner's finding and conclusion with respect to whether St. Helens could complete its rebuilding program have been adopted, rejected or modified and (ii) that the Commission's disjunctive ultimate conclusion (R 618-619) means that it did *not* find that the acquisition may substantially lessen competition and did *not* find that the acquisition may tend to create a monopoly (Pet. Br. 286-287).

On the St. Helens point, the Commission merely asserts, without more, that we are wrong (Comm. Br. 238).

As to its use of the disjunctive in its ultimate conclusion, the Commission claims that it "used the word 'or' simply in recognition of the fact that if either effect was present . . . Section 7 was violated" (Comm. Br. 238-239). Realizing that it was making our point, the Commission adds, parenthetically, that "it had concluded that both [effects] were present" (Comm. Br. 238-239). To the contrary, no such conclusion appears anywhere in the Commission's opinion (see R 606-623).

The Commission's order, being indefinite and uncertain with respect to three basic and essential findings and conclusions, must be set aside.

POINT VI

The Commission has failed to respond to the detailed Specification of Errors set forth in the appendix to our main brief.

We submitted to this Court detailed specifications of the many errors committed by the Commission, with particular emphasis on errors in the findings of fact and conclusions upon which the Commission's order is based (Pet. App. 3-80) and errors respecting the survey evidence (Pet. App. 81-131). The Commission has failed to respond to this showing.

The Commission concedes error in admitting and refusing to strike the survey evidence; it claims only, contrary to the facts, that Crown was not prejudiced thereby (Comm. Br. 229-236).

In response to our Specification of Errors respecting 19 findings of fact and 19 conclusions, the Commission merely states:

“Specification of error number V is addressed to 19 specific findings and 19 specific conclusions. Many of these findings and conclusions are not referred to by number in our argument but we have set forth in a note the specific findings and conclusions attacked by petitioner with appropriate references to the parts of our argument that relate to them.¹³ ”
(Comm. Br. 18)

The Commission does not claim that it has *answered* Specification of Error No. V and, in fact, it has not.

Its references in footnote 13 (Comm. Br. 18-19) to various pages of its brief is merely an attempt to conceal the fact that (i) many of our objections are not answered at all and (ii) its attempted “answers” to many of our other objections are completely unresponsive.

For example, in Finding 69 and in Conclusions 7 and 8 the Commission incorrectly states that Crown, Longview and St. Helens were the principal producers of "coarse papers" in the West (R 577, 590). In our Specification of Errors, we pointed out that St. Regis produced more paper classified as Census coarse paper than St. Helens (Pet. App. 8, 51, 52); this demonstration of significant error is not answered at any of the 106 pages of the Commission's brief referred to by it as "relat[ing]" to this finding and these conclusions (Comm. Br. 18n).

Complaining of the Commission's Findings 70 and 75 that Longview sold its "jobbing papers" to only three customers in the West, we set forth the evidence proving that Longview sold its "jobbing papers" to more than 18 customers in the West (Pet. App. 9-10, 16). The Commission, in turn, does not refer to any evidence but merely refers the Court to pages 40-41 of its brief (Comm. Br. 18), but all it claims at those pages (footnote 30) is that our complaint is unjustified because we refer to "jobbing papers" rather than to sales to jobbers. However, the very basis of our objections to Findings 70 and 75 is that they incorrectly refer to sales of "jobbing papers" to three, rather than to more than 18, customers (R 578, 580-581).

Finding 76 affords another example. In that finding, the Commission stated that western supplies of "coarse papers" have come principally and primarily from western mills (R 581). In our Specification of Errors, we proved—by reciting every bit of evidence relied upon by the Commission—that this finding necessarily depended and was based upon the Commission's biased survey which the Commission refused to strike from the record (Pet. App. 16-36).

In "answer", the Commission refers the Court to pages 57-89, 140-174 and 227-236 of its brief (Comm. Br. 18n). However, the only mention of the matter at pages 57-89 is the Commission's mere assertion that the alleged "gap"

created by the acquisition "could not be filled by Southern or Eastern sources", together with a reference forward to pages 149-166 of its brief (Comm. Br. 58).

Between pages 140 and 174, the Commission merely summarizes and paraphrases the very evidence we set forth at length in our Specification of Errors; the Commission, however, does not even attempt to meet our proof that this evidence relates basically only to the sales of wrapping paper to Pacific Coast paper jobbers (Pet. App. 35-36) and cannot therefore possibly support the Commission's conclusion as to the sales of *all* Census coarse paper grades to *all* customers *throughout* the West.

The Commission's last reference in "answer" to our objection to its Finding 76 is to pages 227-236 of its brief, which contain only the mere assertion that there is "a great deal of evidence" to support Finding 76 and a reference back to the same pages of its brief referred to earlier (pages 140-174) (Comm. Br. 232).

These examples could easily be multiplied, but the foregoing is adequate to make our point: The Commission has not answered our extensive and detailed objections to its findings and conclusions, and is unable to answer them by any reference to the evidence in the record.

The order of the Commission must be reversed because, as we demonstrated in our Specification of Errors, the findings of fact and conclusions upon which its order is based are not supported by substantial evidence, are contrary to the evidence, are based on incompetent evidence, and ignore crucial facts proved by the evidence.*

* These erroneous findings of fact and conclusions constitute the basis of the introductory statement of facts in the Commission's answering brief (Comm. Br. 4-17) which, accordingly, is factually incorrect.

POINT VII

The Commission exceeded its power in framing the order of divestiture.

To our argument that the Commission could not order Crown to divest itself of St. Helens' timberlands because they do not constitute "assets, held . . . contrary to the provisions of" Section 7 (Pet. App. 135-136), the Commission asserts merely that these timberlands "are a vital component for the independent operation of St. Helens" (Comm. Br. 20). We refer the Court to the uncontradicted evidence that timber holdings are *not* necessary to support St. Helens' paper mill because wood chips and other forms of wood waste materials are the major source of wood for making wood pulp for the manufacture of paper in the West (Pet. App. 64; see R 1747-1748 [Wollenberg], 2913, 3957; RX 95 [5119]).* In fact, it is doubtful that anyone buying the St. Helens mill would want to buy the unnecessary timberlands because it would substantially increase the amount of money needed to buy the properties of St. Helens, without a commensurate return in operating income (see RX 92A, 407-416; R 2192 [Oberdorfer]).

To our contention that Crown cannot be required to "restore St. Helens as a competitive entity" (Pet. App. 136), the Commission claims that it has "broad discretion in the framing of orders", citing two decisions of the Supreme Court, neither of which relates to Section 7 orders (Comm. Br. 20). These decisions do not hold that the Commission can go beyond its limited statutory powers in the framing

* In a footnote on page 57 of its brief, the Commission says that timber holdings are "insurance" for a paper mill. "Insurance", however, is a far cry from being "a vital component". Furthermore, 44,000 acres of St. Helens' total of 117,000 acres cannot even be "insurance" because they are located east of the Cascade Mountains and are not within economic distance of the mill (R 1875-1876; CX 4, p. 41 [1755]).

of orders; as the Supreme Court said in one of the cited cases, *FTC v. National Lead Co.*, 352 U. S. 419, 428 (1957):

“As the Court has said many times before, the Commission may exercise only the powers [in framing orders] granted it by the Act.”

The Commission’s command to “restore St. Helens as a competitive entity” is clearly beyond its powers.* As this Court stated in *Western Meat Co. v. FTC*, 33 F. 2d 824, 827 (9th Cir. 1929), cert. granted, 280 U. S. 545 (1929), cert. dismissed, 281 U. S. 771 (1930):

“A decree ordering that a divestment of stock so unlawfully acquired be made in such a way as to restore competition would be incapable of enforcement. The most that could be done was that which was done here, to require the divestment of the stock and the property and to deny the offender the right to obtain or keep any advantage which might be the result, directly or indirectly, of its unlawful act.”

One further point on the Commission’s order: We detect from the Commission’s emphasis in its brief on St. Helens’ becoming an “independent” paper company (Comm. Br. 20, 57n) that the Commission may attempt to interpret its order as requiring Crown to sell St. Helens to a group of private investors or to a company not now engaged in the paper industry. So interpreted, the order would exceed the Commission’s power (see *Western Meat Co. v. FTC*, *supra*). The limit of the Commission’s power under Sec-

* Section 11 of the Clayton Act, as amended, specifically prescribes the order which the Commission may make:

“If upon . . . hearing the Commission . . . shall be of the opinion that any of the provisions of said sections [including Section 7] have been or are being violated, it . . . shall issue and cause to be served on such person an order requiring such person to . . . divest itself of the stock or other share capital, or assets, held . . . contrary to the provisions of [Section 7] . . . , if any there be. . . .”

tion 11 of the Clayton Act is to order divestiture of shares or assets held contrary to the provisions of Section 7; it has no general equity power. It cannot, for example, choose the buyer to whom Crown must sell.

“The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers . . . It has not been delegated the authority of a court of equity.” (*FTC v. Eastman Kodak Co.*, 274 U. S. 619, 623 (1927))

The Commission has sought repeatedly, but unsuccessfully, to have the Congress amend Section 11 so as to give it the power to frame an order which would require the acquiring company to recreate an “entity.” The Commission has argued to the Congress:

“The Commission believes that section 11 of the Clayton Act should be amended in a manner that would permit the Commission to adopt an appropriate remedy fitting the facts in each case. An order of divestiture alone may not be sufficient. *The Commission should have the means to provide for divestiture in a manner which promises to recreate an effective competitive entity.* The draft submitted herewith incorporates . . . language which is believed to be preferable This provision would authorize the Commission to order divestiture ‘in such manner and under such conditions as will effectuate the purposes of section 7 of this act.’ ” (Italics added)*

* Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary pursuant to S. Res. 170 (84th Cong., 2d Sess., May and June 1956), p. 466. See also Hearings before the Antitrust Subcommittee (No. 5) of the House Committee on the Judiciary (84th Cong., 2d Sess., January 1956), pp. 30-31; Hearings before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary pursuant to S. Res. 61 (84th Cong., 1st Sess., May and June 1955), p. 114.

The Congress, however, has not granted to the Commission the equity powers which it has sought, and the Commission cannot arrogate to itself powers which the Congress has deliberately withheld.

POINT VIII

Conclusion.

The petitioner respectfully requests this Court to set aside the order of the Commission and to dismiss the complaint.

Dated: July 20, 1959.

Respectfully submitted,

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